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IN THE

Supreme Court of the United States

STEVEN A. ODOM; MARK GERGEL; HENSLEY E. WEST; MARTIN D. KIDDER; STEPHEN J. CLEARMAN,
Petitioners,

v.

PEDRO YANG; CAROL JACKSON; PETER S. KELSCH, ON BEHALF OF THEMSELVES AND ALL PERSONS SIMILARLY SITUATED; JAMES BARBERIAN; JOSEPH KINOSIAN; KAREN KINOSIAN; JASON THOMPSON; RAYMOND T. CRUMP,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under *American Pipe & Construction Company* v. *Utah*, 414 U.S. 538 (1974), the filing of a class action tolls the statute of limitations on individual class members' claims until the question of class certification is decided.

The question presented is:

Whether, after a motion for class certification is denied on the ground that the class representative is inadequate, another class member can file a second, substantially identical class action, as opposed to an individual action, in a different court and again toll the statute of limitations for all putative class members.

PARTIES TO THE PROCEEDING

All parties to the proceeding are identified in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Steven A. Odom, Mark Gergel, Hensley E. West, Martin D. Kidder, and Stephen J. Clearman (jointly, "petitioners") seek a writ of certiorari to the United States Court of Appeals for the Third Circuit.

OPINIONS AND JUDGMENTS BELOW

On December 15, 2004, the court of appeals issued its decision reversing the district court order granting petitioners' motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). That decision is reported at 392 F.3d 97 (3d Cir. 2004) (App. 1a-30a). The United States District Court for the District of New Jersey issued an order granting petitioners' motion to dismiss the case on June 2, 2003. That decision is reported at 265 F. Supp. 2d 469 (D.N.J. 2003) (App. 31a-42a). The district court granted the motion to dismiss on the ground that a prior class action in the United States District Court for the Northern District of Georgia did not toll the statute of limitations for future class actions; the prior class action is *In re World Access, Inc. Securities Litigation*, 1:99-cv-43-ODE (N.D. Ga.). The July 26, 2001 order of the Georgia district court rejecting the parties' stipulation of class certification (App. 81a-82a), the July 1, 2002 decision denying the motion for class certification (App. 47a-80a), and the August 9, 2002 order denying the plaintiffs' motion for reconsideration of the order denying certification (App. 43a-46a), are not reported.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331. The court of appeals had jurisdiction under 28 U.S.C. § 1291. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE OR RULE INVOLVED

Federal Rule of Civil Procedure 23 is set forth at App. 83a-89a.

INTRODUCTION

The filing of a class action tolls the statute of limitations on individual class members' claims until the question of class certification is decided. *American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538 (1974); *Crown, Cork & Seal Co.* v. *Parker*, 462 U.S. 345 (1983). In the decision below, the Third Circuit held that if a class-certification motion is denied on the ground that the class representative is inadequate, a putative class member can file a second, substantially identical class action in a different court and thereby relitigate the propriety of class certification and again toll the statute of limitations for putative class members.

The Third Circuit recognized that its decision directly conflicts with the rule adopted by the Eleventh Circuit in *Griffin* v. *Singletary*, 17 F.3d 356 (11th Cir. 1994). See App. 14a-15a. There, the Eleventh Circuit refused to "'piggyback one class action onto another,' and thereby engage in endless rounds of litigation . . . *over the adequacy of the successive named plaintiffs to serve as class representatives*." 17 F.3d at 359 (citation omitted) (emphasis supplied). In addition, the Third Circuit's holding is contrary to decisions of numerous courts of appeals which have rejected in unequivocal terms any argument that "putative class members [can] piggyback one class action onto another and thus toll the statute of limitations indefinitely," *Salazar-Calderon* v. *Presidio Valley Farmers Ass'n*, 765 F.2d 1334, 1351 (5th Cir. 1985), on the ground that "extend[ing] tolling to class actions 'tests the outer limits of the *American Pipe* doctrine and . . . falls beyond its carefully crafted parameters into the range of abusive options," *Robbin* v. *Fluor Corp.*, 835 F.2d 213, 214

(9th Cir. 1987) (omission in original) (quoting *Korwek* v. *Hunt*, 827 F.2d 874, 879 (2d Cir. 1987)).

Equally to the point, the Third Circuit rule is in substantial tension with this Court's opinions in *American Pipe* and *Crown, Cork & Seal*, both of which expressly state that *individual claims* are tolled, see, *e.g.*, 414 U.S. at 552, 462 U.S. at 346-47; and neither of which gives any indication that class actions can be stacked one atop the other to permit stop-and-start tolling and render the relevant statute of limitations wholly indeterminate. *American Pipe* and *Crown, Cork & Seal* crafted a tolling rule by striking a specific balance between the efficiency concerns undergirding Fed. R. Civ. P. 23 and the repose and stability interests embodied in limitations periods. The Third Circuit rule upsets the balance struck by this Court by entirely ignoring the interests supporting statutes of limitation.

There can be no doubt that the question presented is both recurring and important. As this petition reflects, numerous courts of appeals and district courts have grappled with the issue. The growth in class-action litigation and the virtually dispositive importance of the class-certification decision ensure that plaintiffs and class counsel will regularly seek a second or third bite at the apple of class certification in a different forum if an initial motion for class certification is denied. Moreover, the continuing conflict on this question contravenes the central purpose of the Federal Rules of Civil Procedure to establish uniform treatment of procedural questions in federal cases and thus prevent forum shopping. In addition, the conflict gives rise to fundamental unfairness because litigants face different limitations rules depending upon whether their case is filed in Georgia or New Jersey. This Court should grant the petition and resolve the conflict on this critically important question that may affect all limitations rules in class-action litigation.

STATEMENT OF THE CASE

1. On January 7, 1999, the first of what would be 22 class action complaints against World Access, Inc. ("WAXS") and former officers and directors of WAXS was filed in federal district court in the Northern District of Georgia. App. 3a. Ultimately, these actions were consolidated as *In re World Access, Inc. Securities Litigation*, 1:99-cv-43-ODE (N.D. Ga.).

The consolidated amended complaint made claims under sections 11 and 15 of the Securities Act of 1933, 15 U.S.C. §§ 77k & 77*o* ("Securities Act"); sections 10(b) and 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j(b) & 78t(a) ("Exchange Act"); and the regulations that the Securities and Exchange Commission prescribed thereunder. See Rule 10b-5, 17 CFR § 240.10b-5. Specifically, the complaint alleged that WAXS and its former officers and directors made materially false and misleading statements and failed to disclose material information concerning WAXS' products, revenues, earnings, inventory and sales practices, and that the plaintiffs had relied on those misstatements and omissions to their detriment. App. 3a. The complaint set forth three subclasses based on how members of each subclass came into possession of WAXS stock during the class period: (1) the NACT merger class, (2) the Telco merger class, and (3) the Open Market class. *Id.*

Plaintiffs filed a motion seeking class certification and the approval of "lead" plaintiffs on July 21, 2000. In March 2001, the Northern District of Georgia appointed three lead plaintiffs – Cari Thompson for the NACT class, John Brothers for the Telco class, and William Tanner for the Open Market class – and directed those plaintiffs to file a joint motion for class certification. App. 4a. On April 18, 2002, plaintiffs filed their motion, and WAXS and its former officers and directors stipulated to class certification. *Id.*

On July 26, 2001, however, the Northern District of Georgia rejected the stipulation, holding that the parties had not demonstrated that Fed. R. Civ. P. 23 had been satisfied. App. 4a; *id.* at 81a-82a. The order stated simply that "the parties have failed to make an appropriate showing that the requirements of Rule 23 have been satisfied as required by the United States Supreme Court." *Id.* at 81a-82a.

The lead plaintiffs renewed their motion for class certification on January 9, 2002, a motion that the defendants did not oppose. On July 1, 2002, the district court issued an order and addressed the propriety of certification of each subclass, finding "deficiencies in each," App. 4a. Specifically, the court expressed "numerous . . . concerns regarding Tanner's representation" of the Open Market class, *id.* at 73a; and the court found that "Thompson has failed to meet her burden regarding numerosity" in connection with the NACT merger class, *id.* at 76a-77a. The court also concluded that Brothers might not be able to prove that he suffered harm as a result of the Telco merger and therefore that he could not "properly represent those members of the Telco class who were harmed by the merger." *Id.* at 78a. The court thus denied the motion for class certification with prejudice. *Id.* at 80a.

The plaintiffs' motions for reconsideration and for interlocutory Eleventh Circuit review pursuant to Fed. R. Civ. P. 23(f) were denied. See App. 43a-46a. The action continued in the Northern District of Georgia on behalf of five individual plaintiffs.[1]

2. On December 17, 2002, Yang, Jackson and Kelsch – one member from each of the three subclasses of the class

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[1] At the oral argument in the Third Circuit, "defendants' counsel reported that the Northern District of Georgia had granted summary judgment in the defendants' favor on the individual plaintiffs' claims." App. 4a n.3 (citing *In re World Access, Inc. Sec. Litig.*, 310 F. Supp. 2d 1281 (N.D. Ga. 2004)). This judgment is now final.

that sought and was denied certification by the Northern District of Georgia – filed this "substantively identical class action in the District of New Jersey . . . against the same defendants." App. 4a. The district court consolidated their action with another brought by James Barberian and Karen Kinosian, and then appointed Jason Thompson and Raymond Crump as lead plaintiffs for the consolidated action. *Id.* at 4a n.4.

Neither the subclass representatives nor the lead plaintiffs had intervened in the earlier suit in the Northern District of Georgia. App 5a. They acknowledged that they chose not to file a separate suit as class representatives in Georgia because under the law of the Eleventh Circuit, the filing of a second class action would be time barred. *Id.*

On March 13, 2003, WAXS and its former officers and directors moved to dismiss the consolidated complaint pursuant to Fed. R. Civ. P. 12(b)(6), on the ground, *inter alia*, that the new class action is barred by the one-year statute of limitations for federal securities fraud claims. See 15 U.S.C. § 77m. On June 2, 2003, the district court granted the motion.

The court first explained that the statute of limitations began to run on January 5, 1999, and that the action was not filed until December 17, 2002; thus, absent tolling, the action was almost three years out of time. App. 37a. The court also observed that under the rule established by *American Pipe*, the prior class action in the Northern District of Georgia tolled the statute of limitations for subsequent individual claims by members of the putative class from the date the suit was filed (January 7, 1999) until the motion for class certification was denied. See *id.* at 38a. But, the court stated, "*American Pipe* has been interpreted in most courts considering the issue as holding that 'stacking' one class action atop another following class certification is prohibited." *Id.* (citing cases). This anti-stacking rule forbids the "filing of a new class action in a different district court after the statutory period has expired"; and for that reason, the

new class action was dismissed. *Id.* at 40a. Finally, the court noted that individual plaintiffs whose claims had not expired lawfully could have chosen to intervene in the ongoing action in the Northern District of Georgia. *Id.* at 41a.

3. A divided panel of the Third Circuit reversed. It agreed with the district court that the statute of limitations began to run on January 5, 1999, and that absent tolling, the one-year limitations period applicable to the action had expired. App. 6a. The court of appeals further agreed with the district court that tolling began "on January 7, 1999, the date that the first of the *In re World Access* suits was filed in the Northern District of Georgia." *Id.* And, the court held that tolling ceased on July 1, 2002, the day that the Northern District of Georgia denied the motion for class certification with prejudice. *Id.* at 8a. Because "[o]nly two days had elapsed between the start of the limitations period and the filing of the first *In re World Access* suit," and because less than six months passed between the denial of class certification and the December 17, 2002 filing of the complaint in the District of New Jersey, the second class action complaint was timely "to the extent tolling applies." *Id.*

While recognizing that its decision placed it in direct conflict with the decisions of other circuits (App. 13a-16a), the Third Circuit decided that with respect to the Open Market and Telco subclasses, the statute of limitations for the new class action in New Jersey *was* tolled by the earlier class action in Georgia. But, the statute of limitations was *not* tolled for the NACT subclass. The court explained that:

> *American Pipe* tolling applies to would-be class members who file a class action following the denial of class certification due to Rule 23 deficiencies of the class representative. *American Pipe* tolling will not apply to sequential class actions where the earlier denial of certification was based on a Rule 23 defect in the class itself. [*Id.* at 11a-12a.]

Thus, the court concluded the claims of the Open Market and Telco subclasses were tolled by action in the Northern District of Georgia because certification was denied to those subclasses on the ground that the class representatives were inadequate. But, the claims of the NACT subclass were not tolled because certification was denied due to the class representative's failure to make the required showing of numerosity. *Id.* at 23a. In so holding, the Third Circuit acknowledged that "[i]n tolling limitations periods for subsequently filed class actions where the sole basis for the earlier denial of certification was the deficiency of the lead plaintiff as class representative, *we inevitably break from some Circuits' treatment of the issue, for the decisions are mixed.*" *Id.* at 12a (emphasis supplied).

As the court detailed, the circuits follow "three approaches" in addressing tolling and sequential class actions: Most courts of appeals refuse to toll limitations for a subsequent class action when a prior class certification was denied without distinguishing among the various grounds for denial of class certification under Federal Rule of Civil Procedure 23. The Eleventh Circuit bars tolling for all sequential class actions, but has made explicit that its bar includes class actions in which the prior class certification was denied because the class representative was inadequate. Indeed, the Third Circuit noted that the Eleventh Circuit's position "has special significance here because its precedential force . . . is precisely what [the plaintiffs] sought to avoid by not filing this action in the Northern District of Georgia." App. 14a n.6. And, finally, the Third Circuit here adopted the position that a prior class action tolls the statute of limitations for a subsequent class action when the certification was denied because the class representative was inadequate. *Id.* at 12a. In so doing, the Third Circuit expressed the view that the Ninth Circuit's position is "supportive of [its] approach." *Id.* See also *id.* at 16a (explaining that the Ninth Circuit first adopted the Eleventh Circuit's approach, but opining that the

Ninth Circuit's most recent opinion adopts the Third Circuit's approach).

Judge Alito concurred in part and dissented in part. He concurred in the holding that "a prior action in which class certification is denied based solely on deficiencies of the class representative tolls the statute of limitations for filing a later, substantively identical action with a new representative," in light of the Third Circuit's prior decision in *McKowan Lowe & Co.* v. *Jasmine, Ltd.*, 295 F.3d 380 (3d Cir. 2002). See App. 28a. Based on that rule, he concurred in the majority's decision that the claims of the Telco subclass were tolled and that the claims of the NACT subclass were not.

Judge Alito dissented from the majority's conclusion that the claims of the Open Market class were tolled, however, on the ground that the District Court Judge had "stated that certification . . . was denied for failure to meet 'the typicality, commonality, adequacy, and superiority requirements." App. 28a-29a (emphasis omitted) (quoting *id.* at 71a). Because the district judge "found two fatal defects – lack of 'commonality' and 'superiority' – that, as the majority acknowledges, are generally 'used to describe class-based characteristics,'" Judge Alito concluded that the court should have held that the prior action did not toll the statute of limitations for the Open Market subclass. *Id.* at 29a.

Judge Alito also pointed out the practical flaw in the majority's approach:

> Our circuit will attract actions in which courts in other circuits have denied class certification. . . . [T]he courts of our circuit will be asked to look behind the text of the opinions denying certification and to determine whether the authors of those opinions really meant to say or should have said what they did. . . . *[I]n most circuits, the distinction . . . between deficiencies in the representative and defects in the class has no bearing on the tolling of the statute of limitations, and therefore district*

courts in those circuits may not always make it clear whether their rulings rest on representative – or class-based defects. [App. 30a (emphasis supplied).]

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AND IS INCONSISTENT WITH DECISIONS OF THIS COURT.

This case involves a direct conflict among the courts of appeals over whether and the extent to which *American Pipe* tolling applies to subsequent class actions. The decision below held that the statute of limitations should be tolled for "would-be class members who file a class action following the denial of class certification due to Rule 23 deficiencies of the class representative." App. 12a. As the Third Circuit acknowledged, its decision "inevitably break[s] from some Circuits' treatment of the issue." *Id.* Most notably, the Eleventh Circuit has expressly refused to toll the statute of limitations in a second class action despite the fact that the first class action was denied due to deficiencies in the class representative. *Griffin*, 17 F.3d at 359. All other circuits have unanimously concluded that *American Pipe* "does not apply to permit a plaintiff to file a subsequent class action following a definitive determination of the inappropriateness of class certification," *Korwek* v. *Hunt*, 827 F.2d 874, 879 (2d Cir. 1987), with no indication that they would create an exception to this blanket rule if the earlier certification were denied due to the inadequacy of the class representative. By carving out an exception for cases in which class certification was denied based on the adequacy of putative class representatives, the Third Circuit's rule conflicts with the rules of six other courts of appeals.

1. In a class action that was substantially identical to this case, the Northern District of Georgia denied a motion for

class certification for three subclasses on the ground that the plaintiff class had failed to meet the requirements of Fed. R. Civ. P. 23(a)(3) and 23(a)(4). App. 71a, 78a. Respondents, who were members of these putative subclasses, did not seek to intervene in the case in the Northern District of Georgia to raise their own claims, as they were entitled to do under *American Pipe*. Nor did Respondents file individual actions in some other jurisdiction, as they were entitled to do under *Crown, Cork & Seal*, 462 U.S. at 353. Instead, class members filed a second, substantially identical class action in the District of New Jersey, attempting to avoid the running of the statute of limitations applicable to class members by "piggyback[ing] one class action onto another" for tolling purposes. *Salazar-Calderon*, 765 F.2d at 1351.

The Third Circuit held that the statute of limitations had been tolled until the class-certification motion was finally denied in the first class action, and that the tolling protected not only putative class members' claims, but also the class members' right to file a second class action, further tolling the limitations period for class members. In so doing, the Third Circuit brought itself into conflict with every other circuit that has faced the question whether class actions can be "stacked" or "piggy-backed" one on top of the other for purposes of tolling the applicable statutes of limitations.

In *Salazar-Calderon*, the earliest court of appeals' decision on point, the Fifth Circuit refused to permit "putative class members [to] piggyback one class action onto another and thus toll the statute of limitations indefinitely." 765 F.2d at 1351. Citing Justice Powell's concern that the tolling rule "is a generous one, inviting abuse," *Crown, Cork & Seal Co.*, 462 U.S. at 354 (Powell, J., concurring), the Fifth Circuit recognized that "to construe the rule as plaintiffs would have us presents just such dangers." 765 F.2d at 1351. The court thus rejected the plaintiffs' position that tolling applies "not only for the first class certification petition filed but also for any subsequent petitions involving the same class." *Id.*

The Second Circuit also declined to toll the statute of limitations for a new class action brought after class certification had been denied. *Korwek*, 827 F.2d at 879. Like the Fifth Circuit, the *Korwek* court recognized that this proposed extension of *American Pipe* "would be inimical to the purposes behind statutes of limitations and the class action procedure." *Id.* The Ninth Circuit echoed these concerns in *Robbin*, where it reasoned "that to extend tolling to class actions 'tests the outer limits of the *American Pipe* doctrine and . . . falls beyond its carefully crafted parameters into the range of abusive options.'" 835 F.2d at 214 (omission in original) (quoting *Korwek*, 827 F.2d at 879); see also *Catholic Soc. Servs., Inc.* v. *INS*, 232 F.3d 1139, 1147 (9th Cir. 2000) (en banc) (reaffirming the Ninth Circuit's refusal to permit a subsequent class action that "is no more than an attempt to relitigate the correctness of the earlier class certification decision").

The Sixth Circuit cited the circuits' then "unanimous agreement" when it held that the "pendency of a previously filed class action does not toll the limitations period for additional class actions by putative members of the original asserted class." *Andrews* v. *Orr*, 851 F.2d 146, 149 (6th Cir. 1988). The *Andrews* court found no support for the plaintiffs' theory that "the *American Pipe* tolling rule applies to class members who do not intervene to appeal, but seek to initiate a new class action." *Id.*

More recently, the First Circuit reaffirmed the circuit courts' limitation on *American Pipe* by barring a class action whose "claims depend[ed] on the 'stacking' of two sequential class actions to keep their claims from being untimely." *Basch* v. *Ground Round, Inc.*, 139 F.3d 6, 11 (1st Cir. 1998). The First Circuit recognized the dangers of an approach that would allow plaintiffs to "stack one class action on top of another and continue to toll the statute of limitations indefinitely." *Id.* Moreover, the court saw the potential for abuse, because "[p]ermitting such tactics would allow lawyers

to file successive putative class actions with the hope of attracting more potential plaintiffs and perpetually tolling the statute of limitations as to all such potential litigants, regardless of how many times a court declines to certify the class." *Id.*

In defending its rule, the Third Circuit explained that none of the cases discussed above involved denial of the initial class certification on the ground that the class representative was inadequate. App. 12a. In that circumstance, the Third Circuit opined, a second litigation of the propriety of class certification under Rule 23 is permitted *and* a second round of tolling is authorized. There are two problems with this attempted distinction: The Eleventh Circuit has expressly rejected it, and nothing in the other circuits' decisions supports it.

Most notably, in precisely the context addressed here – *viz.*, where the initial class-certification was denied based on the inadequacy of the class representative – the Eleventh Circuit followed *Salazar-Calderon* and its progeny and refused to "'piggyback one class action onto another,' and thereby engage in endless rounds of litigation . . . *over the adequacy of successive named plaintiffs to serve as class representatives.*" *Griffin*, 17 F.3d at 359 (citation omitted) (emphasis supplied). Though the Eleventh Circuit applied this Court's rule of tolling the statute of limitations for subsequent *individual* claims, it feared that extending that rule to class claims would allow plaintiffs to "'toll the statute of limitations indefinitely.'" *Id.* at 359-60. Observing that the original lawsuit had been filed 15 years before, the court "decline[d] to adopt any rule that has the potential for prolonging litigation about class representation even further." *Id.* at 359. *Griffin* expressly cited the above-described precedent from other courts of appeals. Numerous district courts have similarly followed the *Griffin* rule in situations

where class certification was denied because of problems with the class representative.[2]

The second problem with the Third Circuit's attempted defense of its rule is that none of the court of appeals decisions holding that *American Pipe* does not permit plaintiffs "to sequentially relitigate a denial of class certification," App. 12a, suggests that a different rule applies if class-certification is denied based on the class representative's inadequacy. Indeed, in *Robbin*, class certification had been denied in the first case because of both the inadequacy of the representative and problems with other Rule 23 elements, but the court made no distinction between the grounds for denial. See 835 F.2d at 214.

The Third Circuit also claimed support from the Ninth Circuit's decision in *Catholic Social Services*. When "read . . . broadly," the panel concluded, *Catholic Social Services* bolsters its "holding that class claims should be tolled where the district court denies class certification based on deficiencies of a class representative, and not on the validity of the class itself." App. 17a. The panel's reliance is

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[2] *See, e.g., Fleck* v. *Cablevision VII, Inc.*, 807 F. Supp. 824, 826 (D.D.C. 1992) (refusing to "extend[] equitable tolling to this situation where, after a first denial of class certification, a new class representative attempts to bring a subsequent class action"); *Fleming* v. *Bank of Boston Corp.*, 127 F.R.D. 30, 37 (D. Mass. 1989) (the reassertion of class claims after certification was denied for lack of standing "would be to sanction and encourage abuse of the class action provisions of federal law"), *aff'd*, 922 F.2d 20 (1st Cir. 1990); *In re Elscint Ltd. Secs. Litig.*, 674 F. Supp. 374, 378 (D. Mass. 1987) (refusing to apply *American Pipe* because it "may condone or encourage attempts to circumvent the statute of limitation by filing a lawsuit without an appropriate plaintiff and then searching for one who can later intervene with the benefit of the tolling rule"); *Burns* v. *Ersek*, 591 F. Supp. 837, 839, 842 (D. Minn. 1984) (refusing to toll the statute of limitations where the original class certification had been denied "on the grounds that plaintiffs were not proper class representatives"), *abrogated on other grounds, Agency Holding Corp.* v. *Malloy-Duff & Assocs.*, 483 U.S. 143 (1987).

misplaced: *Catholic Social Services* took pains to distinguish the unique situation presented from cases in which "the would-be classes in the first actions failed to satisfy criteria of Rule 23" and the plaintiffs in the second action "sought to cure the procedural deficiencies of the first." 232 F.3d at 1148. The Ninth Circuit's holding only applies to situations where the earlier class was properly certified, but the class was subsequently narrowed "for reasons unrelated to Rule 23 certification." *Id.* at 1149. Indeed, because a class had already been certified, most courts would agree that the appropriate remedy was the "appointment of new representatives from the existing class, not decertification." *Carpenter* v. *Stephen F. Austin State Univ.*, 706 F.2d 608, 618 (5th Cir. 1983).

Because every other circuit has categorically refused to extend *American Pipe* to subsequent class claims, the Third Circuit's decision stands in direct conflict with the Eleventh Circuit and with the consensus of six other courts of appeals.

2. This split of authority has been recognized by commentators and the Third Circuit itself. As noted, the decision below conceded that its extension of *American Pipe* "inevitably break[s] from some Circuits' treatment of the issue." App. 12a. In particular, the Third Circuit characterized the Eleventh Circuit's decision in *Griffin* as contrary to its rule. See *id.* at 15a (expressly "reject[ing]" the holding in *Griffin*).

The conflict between the Third and Eleventh Circuits has also been described by treatises and other commentators. See, *e.g.*, 5 James W. Moore, *Moore's Federal Practice* § 23.65[1][b] (3d ed. 2004) (contrasting the Third and Eleventh Circuit's decisions); 18 No. 8 Fed. Litigator 2, 2 (2003) (noting that *Griffin* "does not recognize an exception to the tolling rule" for class representatives, while *McKowan Lowe* does); *Civil Procedure – Class Actions – Third Circuit Holds That The Filing Of A Class Action Tolls The Statute Of Limitations For A Subsequent Class Action When The Initial*

Denial Of Class Certification Is Unrelated To The Appropriateness Of The Underlying Claims For Class Treatment, 116 Harv. L. Rev. 2230, 2233 (2003) (discussing the Third Circuit's "clear split from the Eleventh Circuit's opinion in *Griffin v. Singletary*"); 17 No. 8 Fed. Litigator 189, 190 (2002) (observing the distinction between *Griffin* and cases that tolled the statute of limitations "when a named plaintiff is found to be an inadequate representative of the class").

This acknowledged conflict among the courts of appeals warrants this Court's review.

3. The opinion below is also in substantial tension with the analysis of this Court. *American Pipe* and *Crown, Cork & Seal* established the rule that statutes of limitations for individual claims are tolled until the denial of class certification. Neither the language nor the purposes of those decisions supports tolling for subsequent class claims.

By their terms, both cases authorized tolling statutes of limitations so that "members of the putative class [could] file *individual* actions in the event that class certification is denied." *Crown, Cork & Seal*, 462 U.S. at 346-47 (emphasis supplied); see also *American Pipe*, 414 U.S. at 552 (protecting the "privilege of intervening in an *individual* suit") (emphasis added). Neither case suggests that the statute of limitations should be tolled for subsequent class claims, resulting in a second round of tolling for putative class members. Indeed, the tolling rule is not even triggered until a lawsuit is no longer "permitted to continue as a class action." 414 U.S. at 554.

For this reason, other circuits addressing this issue have focused on the language of this Court's precedents in refusing to toll class claims. See *Korwek*, 827 F.2d at 877 (noting that *Crown, Cork & Seal* tolled the statute of limitations for "all asserted members of a class whether they choose to *intervene* or file '*individual actions*' following the denial of class

certification"); *Andrews*, 851 F.2d at 149 (once class certification is denied, "'class members may choose to file *their own suits* or to intervene as plaintiffs in the pending action'") (quoting *Crown, Cork & Seal*, 462 U.S. at 354). The opinion below, in contrast, discards the plain implication of the Court's words and analysis, asserting that "*Crown, Cork & Seal* goes no further than to state that tolling continues 'until class certification is denied.'" App. 7a (quoting *Crown, Cork & Seal*, 462 U.S. at 354). But, this Court *did* go further in *Crown, Cork & Seal*; the very next sentence stated that class members had a right "to file their *own* suits or to intervene as plaintiffs in the pending action." *Crown, Cork & Seal*, 462 U.S. at 354 (emphasis supplied). This language unmistakably limits the *American Pipe* rule to individual claims, an understanding reflected in other decisions of this Court. See, *e.g.*, *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385, 392 (1977) (distinguishing the *American Pipe* scenario in which a plaintiff "intervene[s] in order to join the named plaintiffs in litigating her *individual* claim") (emphasis supplied); *Chardon* v. *Fumero Soto*, 462 U.S. 650, 661 n.14 (1983) (tolling "applies whether an unnamed plaintiff intervenes in the named plaintiff's suit after denial of class certification or files his or her *own separate action*") (emphasis supplied).

A rule authorizing a second (and potentially a third and fourth) round of tolling of the statute of limitations for class claims also fails to acknowledge the multiple purposes behind *American Pipe* and *Crown, Cork & Seal* and the balancing of interests that took place. Specifically, this Court's tolling rule strikes a balance between the purposes of Rule 23 and the "interest[s] that statutes of limitations are designed to protect." *Crown, Cork & Seal*, 462 U.S. at 353. The latter interests, which are "fundamental to a well-ordered judicial system," preclude the assertion of new claims when it is "sufficiently likely either to impair the accuracy of the fact-finding process or to upset settled expectations that a

substantive claim will be barred without respect to whether it is meritorious." *Board of Regents* v. *Tomanio*, 446 U.S. 478, 487 (1980); see also *American Pipe*, 414 U.S. at 554 (statutes of limitations "prevent[] surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared") (quoting *Order of R.R. Telegraphers* v. *Railway Express Agency*, 321 U.S. 342, 348-49 (1944)).

The Third Circuit's rule destroys the careful balance this Court struck between Rule 23's effort to promote efficiency and the goal of repose embodied in a statute of limitations. By allowing plaintiffs to "stack one class action on top of another and continue to toll the statute of limitations indefinitely," *Basch*, 139 F.3d at 11, the court below discarded the valid policy of repose. This kind of stop-and-start tolling creates a limitations period that bears no relation to the period specified by Congress. Instead, the limitations period would be the period necessary to resolve whether it is appropriate to proceed with a claim as a class action, however long that takes in as many district courts as are necessary for an adequate plaintiff to emerge or be ruled out.

Nor would the Third Circuit rule encourage the efficiency sought by *American Pipe* and *Crown Cork & Seal*. See, *e.g.*, *American Pipe*, 414 U.S. at 553 (tolling is necessary to avoid "depriv[ing] Rule 23 class actions of the efficiency and economy of litigation which is a principal purpose of the procedure"). The Third Circuit's rule would authorize litigation of Rule 23 certification in multiple courtrooms on multiple occasions. It would not encourage the naming of noncontroversial or multiple class members as class representatives in order to ensure efficient adjudication of the propriety of class certification. Instead, it would result in piecemeal litigation of class certification questions across numerous courtrooms and jurisdictions, as occurred here.

The Third Circuit rule is, accordingly, in substantial tension with the balance struck in *American Pipe* and *Crown, Cork & Seal*. For this reason, too, review is warranted.

II. THE ISSUE PRESENTED IS RECURRING AND IMPORTANT TO THE FAIR ADMINISTRATION OF JUSTICE.

The recurring nature of the question presented is vividly illustrated by the numerous opinions of courts of appeals and district courts that have grappled with the issue. The objective conditions leading to the issue's recurrence are easily discerned: There are thousands of class actions pending, and more than 3000 additional class actions are filed in federal district courts every year.[3] Class certification raises the stakes of litigation exponentially, often determining whether a case will settle or be tried. As this Court has recognized, the certification of a large class "may so increase the defendant's potential damages liability and litigation costs" that the defendant will be coerced to settle a case without regard to the merits of any defense. See *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978); Advisory Comm. Notes, Fed. R. Civ. P. 23 ("[a]n order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability"). Thus, if one court denies class certification, it is eminently worthwhile for the class and class counsel to seek a second chance to be certified in another, perhaps friendlier forum. As long as there is uncertainty about whether such actions can be filed and certified, the issue will recur and consume scarce judicial resources.

The need for this Court's resolution of the issue is equally clear. The issue presented is of utmost importance to the litigation process and the administration of civil justice; it

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[3] The annual reports on the Judicial Business of the United States Courts produced by the Judicial Conference contain statistics on class actions. *See* http://www.uscourts.gov/judbususc/judbus.html.

affects the administration of Rule 23 *and* of all statutes of limitations in federal cases and the policy and purposes of such statutes. The Third Circuit's rule is that the filing of a class action not only tolls the claims of putative class members until the class-certification issue is resolved, but also tolls all class members' rights to seek class certification under Fed. R. Civ. P. 23 if class certification in the first action is denied because the named plaintiff is inadequate. For numerous reasons, this rule will work serious harm to both substantive limitations law and the process of administering Rule 23.

First, the consequence of the Third Circuit's rule is not simply the preservation of a putative class member's claim during the pendency of the class-certification decision. It also means that for a second (and potentially a third or fourth) time the statute of limitations for putative class members is tolled so that class members could still file individual lawsuits or yet another class action. This would extend applicable statutes of limitations many years past their original expiration dates in unpredictable fits and starts.

This kind of successive, replicative, "stacking" application of the rationale of *American Pipe* and *Crown, Cork & Seal* is unlike any other kind of tolling and severely undermines statutes of limitations. In rejecting an argument that the statute of limitations begins to run anew each time a predicate act that is part of a RICO violation occurs, this Court spoke in terms that are fully applicable here:

> [This] rule creates a limitations period that is longer than Congress could have contemplated. Because a series of predicate acts . . . can continue indefinitely, such an interpretation, in principle, lengthens the limitations period dramatically. It thereby conflicts with a basic objective – repose – that underlies limitations periods. [*Klehr* v. *A.O. Smith Corp.*, 521 U.S. 179, 187 (1997).]

"Statutes of limitations are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system." *Tomanio*, 446 U.S. at 487. The Third Circuit's rule treats statutes of limitations as if they were infinitely malleable.

Second, for several reasons, the rule is administratively unworkable. As the initial denial of class certification in the Northern District of Georgia reveals (App. 81a-82a), district courts often deny class certification without stating a reason, and thus without indicating in plain terms whether the denial is directed at the adequacy of the class representative or at the failure to satisfy Rule 23's other requirements.

Moreover, as the second denial of class certification in the Northern District of Georgia illustrates (App. 47a-80a), district judges will often deny class certification in terms that leave it unclear whether the denial is directed at the adequacy of the representative or at the other Rule 23 requirements or both. See *id.* at 71a (denying certification for failure to meet "the typicality, commonality, adequacy, and superiority requirements"). As Judge Alito observed, the district judge "found two fatal defects – lack of 'commonality' and 'superiority' – that, as the majority acknowledges, are generally 'used to describe class-based characteristics.'" *Id.* at 29a.

Further, and absolutely critically, a proposed class representative may be inadequate because his or her own claim is weak, but it is often the case that a class representative is inadequate because his or her interests conflict with those of other class members. In the latter circumstance, it is impossible to separate the inadequacy determination from the other elements of class certification. For example, in *Amchem Products, Inc.* v. *Windsor*, 521 U.S. 591, 625-28 (1997), this Court found that intra-class conflicts rendered the named plaintiffs incapable of meeting Federal Rule of Civil Procedure 23(a)(4)'s adequacy-of-representation requirement and thus defeated class certification. But, it was these same

conflicts that also made clear that common issues did not predominate and that the plaintiffs' claims were not typical. *Id.* at 624-25. The Third Circuit's rule – that a denial of certification bars future class actions unless the denial is based on the inadequacy of the class representative – is premised on the wholly false assumption that there is a bright line between the test for an adequate representative and the test for the propriety of class certification.

In sum, as Judge Alito pointed out in dissent, the Third Circuit's rule will require appellate courts to parse and look behind the decisions of district judges in other circuits, a difficult and convoluted prospect at best.

Third, there is an obvious, efficient mechanism to cure the inadequacy of a class representative in those cases where the inadequacy is based on the individual representative's deficiencies rather than deficiencies in the class as a whole. Another class member can intervene in the class action and take the place of the inadequate class representative. See Fed. R. Civ. P. 24; *Manual for Complex Litigation (Fourth)* § 21.26, at 277 (2004) (where a class representative is inadequate, "courts generally allow class counsel time to make reasonable efforts to recruit and identify a new representative who meets the Rule 23(a) requirements. The court may permit intervention by a new representative or may simply designate that person as a representative in the order granting class certification."). This allows a single court to make the Rule 23 inquiry, serving the interests of efficiency that *American Pipe* and *Crown Cork & Seal* embody in their interpretation of Rule 23. It also appropriately balances the interests of repose served by federal statutes of limitations, by preventing stop-and-start tolling. And, it prevents judge and forum shopping by plaintiffs who are not satisfied by the first forum's treatment of the class-certification question.

The tolling rule of *American Pipe* and *Cork Cork & Seal* provides a substantial benefit to plaintiffs. As noted above, it is based on a balancing of the policy considerations

supporting Rule 23 and those supporting statutes of limitation. It is entirely reasonable to limit the tolling rule to the initial class action and to require those accepting the benefit of tolling to take all procedurally viable steps to litigate the propriety of the certification decision in that initial case. Put differently, to obtain the tolling benefit, a class member shoulders the burden of raising and litigating the propriety of class certification, including the burden of demonstrating that there is an appropriate class representative. Cf. *Adams Pub. Sch. Dist.* v. *Asbestos Corp.*, 7 F.3d 717, 718 n.1 (8th Cir. 1993); *Tosti* v. *City of Los Angeles*, 754 F.2d 1485, 1488 (9th Cir. 1985) (tolling ceases for class members who file separate claims and thus opt out of the class action; to retain the benefit of tolling, one must remain bound to the fate of the class action).[4]

This approach is also consistent with the foundational principles of tolling. Where, as here, a statutory limitations period is silent on the question of tolling, that period is "customarily subject to 'equitable tolling.'" *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 95 (1990). This Court has "permitted equitable tolling in situations 'where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass.'" *Young*

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[4] In addition, the Third Circuit's rule badly distorts litigants' incentives under Rule 23. Defendants will have a strong incentive not to challenge the adequacy of the named representatives, but to seek denial of class certification on other Rule 23 grounds. This would seriously undermine Rule 23's goal of assuaging the due process concerns that arise from the binding effect of class judgments on persons not present in the litigation by assuring that the named class representative can fully and fairly litigate class claims. *See Hansberry* v. *Lee*, 311 U.S. 32 (1940). The courts rely on the adversary system to address potential inadequacies in a class representative; and the distortion of the defendant's incentive to challenge the class representative's adequacy presents serious concerns.

et ux. v. *United States*, 535 U.S. 43, 50 (2002). Neither circumstance obtains here; and while there are other circumstances in which tolling may be appropriate, they are limited. See *id.*; see also *Baldwin County Welcome Ctr.* v. *Brown*, 466 U.S. 147, 151 (1984) (per curiam). To justify the Third Circuit rule extending tolling to this setting, there ought to be urgent considerations related to the administration of Rule 23. But, the Third Circuit points to none – indeed, as noted, considerations of efficieney support litigation of the class-certification issue in a single forum for purposes of determining the period of tolling.

Fourth, the Federal Rules of Civil Procedure are intended to establish uniform treatment of all federal cases on matters that are procedural in nature. A lack of uniformity in the interpretation or application of these rules is fundamentally unfair to litigants in class cases. Neither plaintiffs nor defendants should be confronted with less favorable rules depending upon whether a federal nationwide class action is brought in Atlanta or Philadelphia. The current lack of uniformity simply encourages unseemly forum shopping by plaintiffs eager to leverage class certification into coercive settlements. Indeed, plaintiffs here acknowledged that the "precedential force" of *Griffin* in the Eleventh Circuit was "precisely what [plaintiffs] sought to avoid by not filing this action in the Northern District of Georgia." App. 14a n.6. See *id.* at 30a ("[o]ur circuit will attract actions in which courts in other circuits denied class certification") (Alito, J., dissenting). Indeed, this problem is particularly acute in the class-action setting because plaintiffs generally have limitless options as to where they can bring the lawsuit. To permit materially conflicting standards among the circuits unjustly equips plaintiffs' counsel with a one-way ratchet to a more favorable set of rules on the availability of a class action.

Rule 23 is a critically important procedural rule, and statutes of limitation reflect fundamental interests of stability, notice and repose. A conflict concerning an important aspect

of Rule 23's interpretation and application at its intersection with the law governing all federal limitations periods is particularly worthy of this Court's review.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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February 25, 2005

APPENDIX A

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

No. 03-2951

(D.C. Civil No. 02-cv-05968)

PEDRO YANG; CAROL JACKSON; PETER S. KELSCH,
on behalf of themselves and all persons similarly situated;
JASON THOMPSON; RAYMOND T. CRUMP,

v.

STEVEN A. ODOM; MARK GERGEL; HENSLEY E. WEST;
MARTIN D. KIDDER; STEPHEN J.CLEARMAN.

(D.C. Civil No. 03-cv-00725)

JAMES BARBERIAN; JOSEPH KINOSIAN; KAREN KINOSIAN,

v.

STEVEN A. ODOM; MARK GERGEL; HENSLEY E. WEST;
MARTIN D. KIDDER; STEPHEN J. CLEARMAN,

JASON THOMPSON AND RAYMOND T. CRUMP,
Appellants.

Argued June 16, 2004
Filed Dec. 15, 2004

Before ALITO, SMITH, Circuit Judges and DUBOIS, District Judge.*

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* Honorable Jan E. DuBois, Senior District Judge for the Eastern District of Pennsylvania, sitting by designation.

OPINION OF THE COURT

SMITH, Circuit Judge.

Pedro Yang, Carol Jackson, and Peter Kelsch, one member of each of three would-be subclasses in this class action, on behalf of themselves and similarly situated individuals, appeal the District Court's refusal to toll the applicable statute of limitations during the pendency of a prior, substantively identical suit. Absent tolling, this second suit is time-barred.

The Northern District of Georgia denied class certification to all three subclasses in the earlier class action because it found the original lead plaintiffs, or the subclass itself, deficient under Rule 23 of the Federal Rules of Civil Procedure. In this suit, filed in the District of New Jersey, Plaintiffs argue that under *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974), the statute of limitations should have been tolled during the pendency of the prior class action. The District Judge in New Jersey disagreed, concluding that *American Pipe* tolling is limited to intervenors—either as class representatives or as individuals—in the original suit, or to an individual plaintiff filing a new suit, but that it does not extend to the filing of a new class action. Because we can discern no principled basis for limiting the application of tolling in this way, we will affirm in part and reverse in part. We hold that *American Pipe* tolling applies to the filing of a new class action where certification was denied in the prior suit based on the lead plaintiffs' deficiencies as class representatives, but that *American Pipe* tolling does not apply where certification was denied based on deficiencies in the purported class itself.

I.

On January 7, 1999, the first of 22 class action complaints against World Access, Inc. ("WAXS")[1] and certain of its former officers and directors[2] was filed in the United States District Court for the Northern District of Georgia. These actions were consolidated as *In re World Access, Inc. Securities Litigation*, 1:99-cv-43-ODE (N.D.Ga.).

The *In re World Access* Consolidated Amended Complaint included claims under Sections 11 and 15 of the Securities Act of 1933 (the "Securities Act"), 15 U.S.C. §§ 77(k) and 77(*o*), Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. §§ 78j(b) and 78t(a), and the rules and regulations promulgated thereunder, including Securities and Exchange Commission ("SEC") Rule 10b-5, 17 C.F.R. § 240.10b-5. The complaint alleged that the defendants issued materially false and misleading statements and omitted from disclosure material information concerning the products, revenues, earnings, and inventory and sales practices of WAXS, and that the plaintiffs relied on the misstatements and omissions to their detriment. The complaint identified three distinct subclasses related to how each came into possession of WAXS stock during the class period: (1) the NACT merger class ("NACT"), (2) the Telco merger class ("Telco"), and (3) the Open Market class.

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[1] On April 10, 2001, WAXS filed a notice of bankruptcy petition and automatic stay of proceedings. All litigation against WAXS itself, therefore, was suspended and the class action continued against only the individual defendants.

[2] The individual defendants in the action included the following persons who were WAXS officers and/or directors during the class period: Steven A. Odom, Chairman and Chief Executive Officer; Mark Gergel, Chief Financial Officer and an Executive Vice President; Hensley E. West, President, Chief Operating Officer and Director; Martin D. Kidder, Principal Accounting Officer, Controller, Secretary to the Board of Directors and a Vice President; and Stephen J. Clearman, a Director.

On July 21, 2000, the plaintiffs moved for class certification and for approval of lead plaintiffs. On March 29, 2001, the Northern District of Georgia appointed William B. Tanner, Cari Thompson, and John W. Brothers as the lead plaintiffs for the Open Market, NACT, and Telco classes, respectively. In that same order the court directed the lead plaintiffs to file a joint motion for class certification. The lead plaintiffs filed their renewed class certification motion on April 18, 2001. The defendants agreed to stipulate to class certification. However, on July 26, 2001, the Northern District of Georgia rejected the stipulation, finding that the parties had failed to make an appropriate showing that the requirements of Rule 23 had been satisfied.

The lead plaintiffs renewed their motion for class certification on January 9, 2002, which the defendants did not oppose. On July 1, 2002, in an order addressing each of the subclasses in turn and citing deficiencies in each, the Northern District of Georgia denied the plaintiffs' renewed motion for class certification with prejudice. The plaintiffs' motions for reconsideration and for interlocutory Eleventh Circuit review were denied, and the action continued in the Northern District of Georgia on behalf of five individual plaintiffs.[3]

On December 17, 2002, Yang, Jackson, and Kelsch, one would-be member from each of the three subclasses of the purported class which was denied certification by the Northern District of Georgia, initiated this substantively identical class action in the District of New Jersey ("District Court") against the same defendants.[4] In their brief to this Court,

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[3] During argument before this Court, Defendants' counsel reported that the Northern District of Georgia had granted summary judgment in the defendants' favor on the individual plaintiffs' claims. *See In re World Access, Inc. Secs. Litig.*, 310 F.Supp.2d 1281 (N.D.Ga.2004).

[4] The District Court consolidated the *Yang* action with one brought by James Baberian and Karen Kinosian, and appointed Jason Thompson and Raymond Crump as lead plaintiffs for the consolidated action.

Plaintiffs-Appellants, who were not parties to the earlier suit, explain that they filed this class action rather than intervene in their individual capacities in the then-pending action in the Northern District of Georgia, because "given the size of their losses, it was not economically feasible to prosecute the action on an individual basis." They further acknowledge that they did not seek to intervene as class representatives in the Georgia action "because the Eleventh Circuit (unlike the Third Circuit in *McKowan,* 295 F.3d 380) has refused to toll the statute of limitations [which] barred claims as untimely."

On March 13, 2003, Defendants moved to dismiss the complaint pursuant to Rule 12(b)(6), arguing, *inter alia,* that this action is barred by the one-year statute of limitations for federal securities fraud claims imposed by 15 U.S.C. § 77m. On June 2, 2003, the District Court granted the motion to dismiss, ruling that the prior action did not toll the statute of limitations for future class actions, and thus use of the class action mechanism is time-barred. Crucial to its conclusion, the District Court reasoned that this Court's opinion in *McKowan Lowe v. Jasmine, Ltd.,* 295 F.3d 380 (3d Cir.2002), "limits the breadth of the *American Pipe* tolling exception to subsequent claims filed by intervenors, and does not toll the statute of limitations for a new action filed in a different district court." *Yang v. Odom,* 265 F.Supp.2d. 469, 474 (citing *American Pipe & Construction Co. v. Utah,* 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974)). Plaintiffs challenge this holding.

II.

The District Court had jurisdiction pursuant to 28 U.S.C. § 1331. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

This Court undertakes plenary review of the District Court's Rule 12(b)(6) dismissal on statute of limitations grounds. *See Lake v. Arnold,* 232 F.3d 360, 365 (3d Cir.

2000) ("This plenary review extends to the District Court's choice and interpretation of applicable tolling principles and its conclusion that the facts prevented a tolling of the statute of limitations"). A motion to dismiss pursuant to Rule 12(b)(6) is properly granted if, "accepting all well pleaded allegations in the complaint as true, and viewing them in the light most favorable to plaintiff, plaintiff is not entitled to relief." *In re Burlington Coat Factory Secs. Litig.*, 114 F.3d 1410, 1420 (3d Cir.1997) (quotations and citations omitted).

III.

Claims arising under § 77k of the Securities Act are subject to a one-year statute of limitations period. 15 U.S.C. § 77m. This period begins to run either upon "discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence." *Id.* The District Court found that the statutory period began to run on January 5, 1999, the date WAXS announced that its fourth quarter earnings would fall significantly short of projections. The *Yang* plaintiffs do not challenge that finding on appeal and concede that absent tolling, the limitations period would have expired before they filed their complaint in the District Court.

Where tolling applies, it begins on January 7, 1999, the date that the first of the *In re World Access* suits was filed in the Northern District of Georgia. Defendants argue that "the limitations period began to run again on July 26, 2001, the date that the district court in Georgia first denied the plaintiffs' class certification motion." Under this argument, the statute of limitations would have expired on July 24, 2002, almost five months before the present complaint was filed in the District of New Jersey. Among other cases, Defendants cite *Crown, Cork, & Seal Co., Inc. v. Parker*, 462 U.S. 345, 354, 103 S.Ct. 2392, 76 L.Ed.2d 628 (1983), in

support of this contention, but *Crown, Cork & Seal* goes no further than to state that tolling continues "until class certification is denied." *Id.* at 354.

This Circuit declared in *Edwards v. Boeing Vertol Co.*, 717 F.2d 761 (3d Cir.1983), that, "[c]onsistency with the policies reiterated in *Crown, Cork & Seal* requires that the tolling of the statute of limitations continue until a final adverse determination of class claims." *Id.* at 766. *Edwards* concluded that such a final adverse determination in the prior case that tolled the statute of limitations had occurred only when the issue was decided on appeal. *Id.* at 765-66. That conclusion was based on the fact that the class had been certified and the issues raised by the class had gone to trial. *Id.* at 766. Although the district court found against the class in its verdict, questions remained as to whether the district court should have dismissed the claims of all class members who were not parties when it ruled in favor of some of the individual named plaintiffs in the bifurcated trial. *Id.* at 765.

Here, there is no basis for extending applicable tolling through the pendency of the *In re World Access* appeal in the Eleventh Circuit. We do not agree with Defendants, however, that applicable tolling ended when the Northern District of Georgia first denied class certification. That initial denial was a rejection of the parties' proposed joint stipulation of a class definition, and as such was not the kind of "final adverse determination of class claims" required by *Edwards*. The July 26, 2001, order states only that "the parties have failed to make an appropriate showing that the requirements of Rule 23 have been satisfied as required by the United States Supreme Court." It does not identify the basis for the rejection or even the particular requirement(s) of Rule 23 that had not been satisfied.

Indeed, *Korwek v. Hunt*, 827 F.2d 874 (2d Cir.1987), the leading case cited by Defendants in arguing that tolling should not apply, would end tolling only upon a deter-

mination by the district court that provided "dispositive reasons indicating unequivocally that a class action suit was inappropriate." *Id.* at 877 (declining to apply tolling where "district court rendered a definitive determination as to potential manageability problems and intraclass conflicts"). *American Pipe*, the seminal case on the issue of tolling statutes of limitations during the pendency of a class action, is not to the contrary; there the Supreme Court concluded that tolling continued only "during the pendency of the motion to strip the suit of its class action character." 414 U.S. at 561, 94 S.Ct. 756.

Here, a final adverse determination of class claims in *In re World Access*, and a resolution to the defendants' attempt to strip the suit of its class action character, did not occur until the Northern District of Georgia denied class certification with prejudice on July 1, 2002, and the applicable tolling period ended that day.

Only two days had elapsed between the start of the limitations period and the filing of the first *In re World Access* suit. Therefore, the *Yang* complaint, having been filed on December 17, 2002, (i.e., less than six months after the applicable tolling period ended), was timely to the extent that tolling applies.

IV.

A. Class Action Tolling in the Supreme Court: American Pipe *and* Crown, Cork & Seal

The Supreme Court announced in *American Pipe* that

> at least where class action status has been denied solely because of failure to demonstrate that 'the class is so numerous that joinder of all members is impracticable,' the commencement of the original class suit tolls the running of the statute for all purported members of the

> class who make timely motions to intervene after the court has found the suit inappropriate for class action status.

414 U.S. at 552-53, 94 S.Ct. 756. In reaching that conclusion, the Court weighed the policies behind both statutes of limitations and the class action mechanism to determine that "[s]ince the imposition of a time bar would not in this circumstance promote the purposes of the statute of limitations, the tolling rule we establish here is consistent both with the procedures of Rule 23 and with the proper function of the limitations statute." *Id.* at 555, 94 S.Ct. 756. Statutory limitation periods serve

> [t]he policies of ensuring essential fairness to defendants and of barring a plaintiff who has slept on his rights, [and] are satisfied when, as here, a named plaintiff who is found to be representative of a class commences a suit and thereby notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment. Within the period set by the statute of limitations, the defendants have the essential information necessary to determine both the subject matter and size of the prospective litigation, whether the actual trial is conducted in the form of a class action, as a joint suit, or as a principal suit with additional intervenors.

Id. at 554-55, 94 S.Ct. 756 (internal citation and quotation omitted). To explain why tolling should apply while a class certification decision is pending, the Court reasoned that the alternative would

> frustrate the principal function of a class suit, because then the sole means by which members of the class could assure their participation in the judgment if notice of the class suit did not reach them until after the

> running of the limitation period would be to file earlier individual motions to join or intervene as parties—precisely the multiplicity of activity which Rule 23 was designed to avoid in those cases where a class action is found 'superior to other available methods for the fair and efficient adjudication of the controversy.'

Id. at 551, 94 S.Ct. 756 (quoting Fed.R.Civ.P. 23(b)(3)).

The Supreme Court later explained that the *American Pipe* holding extends to "all asserted members of the class, not just as to intervenors." *Crown, Cork & Seal,* 462 U.S. at 350, 103 S.Ct. 2392 (internal citation and quotation omitted). The Court based its decision to extend *American Pipe* to individual suits on its conclusion that "[m]uch the same inefficiencies would ensue if *American Pipe*'s tolling rule were limited to permitting putative class members to intervene after the denial of class certification." *Id.*

Pertinent to the issue before us, the Court observed that because the filing of a class complaint puts a defendant on notice "of the need to preserve evidence and witnesses respecting the claims of all the members of the class[,] . . . [t]olling the statute of limitations thus creates no potential for unfair surprise, *regardless of the method class members choose to enforce their rights upon denial of class certification.*" *Id.* at 353, 103 S.Ct. 2392 (emphasis added). Here, we are asked to determine the extent to which the suits contemplated in *Crown, Cork & Seal*—i.e., those brought by individuals following a denial of class certification—can be aggregated in a subsequent substantively identical class action.

B. Tolling and Sequential Class Actions in the Courts of Appeal

In *McKowan,* this Court held that *American Pipe* tolling applies to an intervenor as a proposed lead plaintiff in a later class action where the district court had, in a prior class action, declined "to certify a class for reasons unrelated to the

appropriateness of the substantive claims for certification." 295 F.3d at 389.[5] In *McKowan*, although the original class suit satisfied the commonality and numerosity requirements of Rule 23, the district court rejected the motion for class certification because the putative lead plaintiff failed to satisfy the requirements of typicality and adequacy. We stressed that the intervening class representative in *McKowan* was not "attempting to resuscitate a class that a court [had] held to be inappropriate as a class action," and that the class certification motion had not been "rejected because of any defects in the class itself but because of [the lead plaintiff's] deficiencies as a class representative." *Id.* at 386. Indeed, this Court stated that "we see no good reason why class claims should not be tolled where the district court had not yet reached the issue of the validity of the class." *Id.* at 389.

Plaintiffs here argue that the District Court improperly limited *McKowan* to its specific facts. According to Plaintiffs, the *McKowan* rationale should apply equally to the filing of a new class action with different class representatives. Defendants counter that neither *American Pipe* nor *Crown, Cork & Seal* supports the extension of the tolling doctrine to class claims in a new action filed in a different court. Thus, Defendants urge this Court to cabin *McKowan*'s application of tolling to purported class members as intervenor class representatives in the same class suit, and to refuse to extend the reasoning of *McKowan* to purported class members' pursuit of a new class action in a different forum. Because we can discern no principled basis for the line-drawing Defendants suggest, we hold instead that *American*

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[5] *McKowan* built on *Haas v. Pittsburgh Nat'l Bank*, 526 F.2d 1083 (3d Cir.1975), where this Court held that "the broad tolling principle" enunciated in *American Pipe* should apply to a replacement lead plaintiff where the district court determined after certification of a class that the original lead plaintiff did not have standing to sue on behalf of the class. *Id.* at 1097.

Pipe tolling applies to would-be class members who file a class action following the denial of class certification due to Rule 23 deficiencies of the class representative. *American Pipe* tolling will not apply to sequential class actions where the earlier denial of certification was based on a Rule 23 defect in the class itself.

Defendants rely upon a line of cases from other courts of appeal, typified by the Second Circuit's *Korwek* decision, to argue that this Court should limit the rule announced in *McKowan*. As we stated in *McKowan*, this Court agrees with the *Korwek* line of cases insofar as they refuse to toll limitations periods for substantively identical class actions in which the earlier putative class was denied certification because the substantive claims were inappropriate for class treatment. Our review of the case law of the Circuits which have addressed the issue reveals them to be unanimous on this point. No Circuit allows plaintiffs the benefit of *American Pipe* tolling to sequentially relitigate a denial of class certification based on a Rule 23 deficiency in the class itself.

In tolling limitations periods for subsequently filed class actions where the sole basis for the earlier denial of certification was the deficiency of the lead plaintiff as class representative, we inevitably break from some Circuits' treatment of the issue, for the decisions are mixed. The Circuits have taken three approaches: (1) the majority of Circuits have not tolled limitations where the earlier class was denied certification because of a deficiency in the class itself, but have not addressed the distinction at issue here; (2) the Eleventh Circuit bars tolling for all sequential class actions; and (3) supportive of this Court's approach, the Ninth Circuit has recently allowed plaintiffs to aggregate their claims in a second class action if their individual claims would be timely using *American Pipe* tolling; the case involved a class which

had been certified before enactment of a statute abrogated the certification, but the rationale of the Ninth Circuit's holding potentially extends to all sequential class actions.

Illustrative of the first approach, the Second Circuit in *Korwek* held that tolling did not apply "to permit the filing by putative class members of a subsequent class action nearly identical in scope to the original class action which was denied certification." *Id.* at 876. Contrary to the broad scope of certification requested by the plaintiff, the district court in the original class suit, citing problems of manageability and intraclass conflict, decided to "limit drastically the scope of the class certified" to be coextensive with the lead plaintiff's trading behavior in the silver futures market. *Id.* Purported members of the class excluded by the narrowed scope then filed a new class action requesting certification of a class identical in scope to the broad request rejected in the original suit. *Id.* at 876. The Second Circuit rightly declined to toll the statutory period in these circumstances, as the district court had found that the broad class requested would be unwieldy and unmanageable regardless of the class representative. Indeed, the Second Circuit did not foreclose tolling the limitations period for subsequent class actions asserting an appropriate scope. *Id.* ("This Court notes that it leaves for another day the question whether the filing of a potentially proper subclass would be entitled to tolling under *American Pipe*.").

In taking this approach, *Korwek* followed the Fifth Circuit's decision in *Salazar-Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334 (5th Cir.1985), which found that "*American Pipe* tolling does not apply to permit putative class members to file a subsequent class action." *Korwek*, 827 F.2d at 877-78. Significantly, in *Salazar-Calderon* the putative class had been denied certification in the first action because of defects in the purported class itself. The Fifth Circuit noted that common questions of law and fact did not

predominate among the putative class members and that "a class action was not necessarily the superior method for handling the controversy." *Salazar-Calderon*, 765 F.2d at 1350. Similarly, in the leading First Circuit case which followed *Korwek* and *Salazar-Calderon*, the refusal to allow tolling in sequential class actions was in the context of a district court having based its earlier denial of class certification on deficiencies in the class itself. *See Basch v. Ground Round, Inc.*, 139 F.3d 6, 8 n. 4 (1st Cir.1998) (class members not "similarly situated" due to many factual differences between them); *see also Andrews v. Orr*, 851 F.2d 146, 149 (6th Cir.1988) (applying *Korwek* and *Salazar-Calderon* without noting the reason for the district court's denial of class certification).

The second approach, which only the Eleventh Circuit has taken, reads *Korwek* broadly to deny tolling to all sequential plaintiffs invoking the class action device, regardless of the reason class certification was denied in the earlier suit. In *Griffin v. Singletary*, 17 F.3d 356 (11th Cir.1994), which involved a district court's denial of class certification for lack of a proper representative, the Eleventh Circuit cited *Andrews*, *Korwek*, *Salazar-Calderon*, and *Robbin v. Fluor*, 835 F.2d 213 (9th Cir.1987), for the proposition that at that time all Circuit courts agreed that a pending class action does not toll the limitations period for later class actions brought by putative members of the class denied certification earlier. *Griffin*, 17 F.3d at 359.[6] The Eleventh Circuit continued, "The plaintiffs may not 'piggyback one class action onto another,' *Salazar-Calderon*, 765 F.2d at 1351, and thereby

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[6] As noted previously, *Griffin* has special significance here because its precedential force within the Eleventh Circuit is precisely what Yang, Jackson, and Kelsh sought to avoid by not filing this action in the Northern District of Georgia.

engage in endless rounds of litigation in the district court and in this Court over the adequacy of successive named plaintiffs to serve as class representatives." *Griffin*, 17 F.3d at 359.

As this Court stated in *McKowan*, "The *Griffin* Court does not appear to have distinguished between the *Korwek* line of cases where denial of tolling followed a decision rejecting the class action itself and the situation where no court has yet determined that the class action is inappropriate." *McKowan*, 295 F.3d at 388. While *Griffin's* denial of tolling for all sequential class action plaintiffs has the virtue of clarity and ease of application, it is also characterized by a rigidity which we reject for at least three reasons. First, by its terms, *Korwek* invited refinement, and *Griffin* in effect bootstrapped *Korwek's* limited holding to be a blanket prohibition on sequential class actions. Moreover, it did so without analysis. Second, as discussed below, to the degree *Griffin* relied on *Robbin*, that foundation has eroded because the Ninth Circuit has since held that at least in certain circumstances, individuals whose claims were tolled by an earlier class action can aggregate their claims in a subsequent class suit. *Catholic Social Servs., Inc. v. I.N.S.*, 232 F.3d 1139 (9th Cir.2000) (en banc). Third,

> The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.

Amchem Prods. v. Windsor, 521 U.S. 591, 617, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir.1997)). Given that *American Pipe* tolling would unquestionably apply were the plaintiffs here to bring individual actions, it would be at odds with the policy undergirding the class action device, as stated

by the Supreme Court, to deny plaintiffs the benefit of tolling, and thus the class action mechanism, when no defect in the class itself has been shown.

The Ninth Circuit has taken the third approach. In *Robbin*, the prior class action was denied certification because the class as defined lacked commonality and because the lead plaintiff was not typical of the class in that he was vulnerable to additional defenses. *See Robbin*, 835 F.2d at 214; *Schlesinger Inv. P'ship v. Fluor Corp.*, No. 81 Civ. 2852, 1983 U.S. Dist. LEXIS 15329, at *18, (S.D.N.Y. July 14, 1983). On appeal, the Ninth Circuit relied on *Korwek* in declining to extend tolling to a subsequently filed class action, stating, "to extend tolling to class actions 'tests the outer limits of the *American Pipe* doctrine and . . . falls beyond its carefully crafted parameters into the range of abusive options.'" *Robbin*, 835 F.2d at 214 (quoting *Korwek*, 827 F.2d at 879).

However, in *Catholic Social Services*, the Ninth Circuit abandoned *Robbin's* seemingly encompassing holding by allowing certification of a subsequent class comprised of individuals whose individual claims were tolled by an earlier class action. In *Catholic Social Services*, following district court certification of the class, Congress stripped federal courts of jurisdiction over the named plaintiffs. 232 F.3d at 1144. A second class action, which would have been time-barred if the first suit did not toll the statute of limitations, named plaintiffs who alleged that they satisfied the new jurisdictional requirements. *Id.* In affirming the district court's application of *American Pipe* tolling, the en banc Ninth Circuit refused to distinguish, for tolling purposes, subsequent suits brought by individuals from those aggregated as class actions: "Strictly speaking, this is not a statute of limitations question at all. It is, rather, a question of whether plaintiffs whose individual actions are not barred may be permitted to use a class action to litigate those

actions." *Id.* at 1147. In assessing that question, the Ninth Circuit distinguished its own decision in *Robbin*, as well as the *Korwek*, *Griffin*, and *Salazar-Calderon* decisions, on the basis that the plaintiffs were "not attempting to relitigate an earlier denial of class certification, or to correct a procedural deficiency in an earlier would-be class." *Id.* at 1149.

To be sure, *Catholic Social Services* involved a class that indeed had been certified before enactment of the statute abrogated the certification, a situation possibly unique in Circuit case law. However, its rationale undergirds the distinction this Court adopted in *McKowan* and which we iterate here.[7] *Catholic Social Services* may be read narrowly or broadly. At its narrowest, *Catholic Social Services* is limited to the rare factual scenario in which the certification of a class is later abrogated by statute. This reading does not implicate the usual case where the class was not certified in the prior action, i.e., cases where the suitability of the putative class for class treatment was not reached, either because the action was dismissed or abandoned on other grounds. In a more broad sense, *Catholic Social Services* can be read as authority for our holding that class claims should be tolled where the district court denies class certification based on deficiencies of a class representative, and not on the validity of the class itself.

In *McKowan*, this Court distinguished the *Korwek* line of cases (the first approach) and rejected the Eleventh Circuit's

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[7] Although no court of appeals has yet applied tolling to subsequent class claims where certification in the prior class action had been denied on the basis of the lead plaintiffs' deficiencies as class representatives, a number of district courts have done so. *See i.e., Shields v. Smith*, 1992 U.S. Dist. LEXIS 15718, *8 (N.D.Cal. Aug. 14, 1992); *In re Quarterdeck Office Systems, Inc.*, No. CV-92-3970-DWW, 1994 WL 374452, *4 (C.D.Cal. Mar. 24, 1994); *In re Crazy Eddie Secs. Litig.*, 802 F.Supp. 804, 813 (E.D.N.Y.1992); *Schur v. Friedman & Shaftan, P.C.*, 123 F.R.D. 611, 613 (N.D.Cal.1988).

categorical bar (the second approach) to allow intervenors to benefit from *American Pipe* tolling in an attempt to certify a class so long as the earlier class action was denied certification because the putative representative, but not the class itself, suffered a Rule 23 infirmity. Unlike the *Korwek* plaintiffs, the lead plaintiff in *McKowan* was not attempting to "resuscitate a class that a court ha[d] held to be inappropriate as a class action." *McKowan*, 295 F.3d at 386. Rather, the lead plaintiff in *McKowan* "was not rejected because of any defects in the class itself but because of [his] deficiencies as a class representative." *Id.; see id.* at 388 ("[T]he *Griffin* panel's reasoning is inconsistent with our precedent in *Haas* where we approved *American Pipe* tolling for a subsequent representative's class claims after the original certified class representative was found wanting.").

V.

In light of the forgoing discussion, the basis for the Northern District of Georgia's denial of class certification is central to this appeal. We note as an initial matter that the District Court concluded that the Northern District of Georgia "denied certification with prejudice based on the inadequacy of the class representatives." *Yang*, 265 F.Supp.2d at 471. Our own examination of the Northern District of Georgia's decision leads us to the same conclusion with respect to the Open Market and Telco classes: the denials of certification to these classes were based solely on deficiencies in the putative representatives. We therefore reverse the District Court's ruling and hold that *American Pipe* tolling applies to the class claims of the Open Market and Telco classes. As to the NACT class, however, the Northern District of Georgia's opinion indicates that class certification was denied for lack of numerosity—a class defect. Therefore, the District Court's refusal to apply *American Pipe* tolling to this class was correct and we will affirm its ruling that the current class claims of the NACT class are time-barred.

Tanner and the Open Market Class

The Northern District of Georgia began its analysis by noting that the class was sufficiently numerous. The remainder of the court's analysis, however, focused on Tanner's suitability to be the lead plaintiff. Not having reached the class members' suitability for class treatment beyond noting that Rule 23's numerosity requirement was satisfied, the District Court on remand will have to address the issue, and may yet determine that a Rule 23 defect exists in the class itself, requiring a denial of class certification or a division of issues and/or creation of subclasses pursuant to Rule 23(c)(4).

The Northern District of Georgia indicated that Tanner's particular WAXS trading behavior presented a hurdle to proving the reliance prong of the securities action such that it would be unfair to couple the fortunes of the Open Market class members to Tanner's claim. The court explained that under the Supreme Court's endorsement of the fraud-on-the-market theory in *Basic Inc. v. Levinson*, 485 U.S. 224, 247, 108 S.Ct. 978, 99 L.Ed.2d 194 (1988), courts may presume that members of a putative class of stock purchasers relied on the integrity of market prices, alleged to be fraudulently inflated, in making purchasing decisions. Evidence of subjective reliance by individual purchasers is unnecessary. The presumption of reliance is rebuttable, however, and the court explained why Tanner was too susceptible to anticipated defense arguments to be the Open Market class representative. Moreover, the court was also concerned that Tanner had first purchased WAXS stock in April 1998, a full year after the class period began, suggesting that Tanner's claims would not be adequately aligned with those of the class members. Significantly, the court did not address whether the class itself was suitable for employment of the fraud-on-the-market presumption, or whether the WAXS purchasing behavior of the class as a whole was sufficiently common to be aggregated in a class action.

The Northern District of Georgia noted that on January 5, 1999, the same day WAXS announced that poor sales of the CDX switch would lower its quarterly earnings to less than half of analysts' estimates, Tanner purchased 24,000 WAXS shares. By purchasing WAXS stock on the earnings announcement, the court reasoned, Tanner did not rely on the defendants' alleged misstatements of fact. This purchase undermined the reliance element necessary to his claim, and cast doubt on his suitability to be the Open Market Class representative. Indeed, Tanner's purchase may have placed him directly at odds with the class members he sought to represent. That is, the fate of class members dependent on the fraud-on-the-market theory to establish their reliance on the alleged misrepresentations of the defendants should not be tied to a representative who purchased WAXS stock immediately after the alleged misrepresentations were revealed.

Based on his entry late in the class period and his January 5, 1999, sale of WAXS stock, the court determined that "*Tanner has failed,* however, to meet *his* burden with regard to the typicality, commonality, adequacy, and superiority requirements." (emphasis added). The Northern District of Georgia did not, however, indicate that the class as a whole also suffered from similar defects.

Though the deficiencies mentioned by the court often indicate defects in the class itself, the Northern District of Georgia's opinion reveals that the Open Market class was denied certification solely because Tanner was not an appropriate class representative and not because the class itself was deficient under Rule 23.

With respect to typicality, commonality, and adequacy, the court explained that because Tanner first entered the putative Open Market class half-way through the class period, it was "unclear whether common questions of law and fact predominate," and it could not "be assumed that Tanner [would] adequately represent those early members of the class as

vigorously as the later members of the class." The court did not inquire whether the class members themselves had predominating common questions of law or fact supporting their claims, such that a typical lead plaintiff could be found to adequately represent the claims of the putative class members.

As this Court has stated, "Class actions are a particularly appropriate and desirable means to resolve claims based on the securities laws, since the effectiveness of the securities laws may depend in large measure on the application of the class action device." *Eisenberg v. Gagnon*, 766 F.2d 770, 775 (3d Cir.1985). Given the prevalence of the class action mechanism in securities regulation, and because the Northern District of Georgia did not suggest that *In re World Access* was anything but a routine securities class action, we believe the Northern District of Georgia was referring solely to Tanner when speaking of typicality, commonality, and adequacy. Whether the class itself merits class treatment is an inquiry the District Court will address on remand.

Lastly, having noted that a class action may be maintained only when it is found to be superior to other available adjudicative methods, the Northern District of Georgia reasoned that Tanner's large stake in WAXS gave him adequate incentive to pursue his claim individually, and thus his resort to the class action device was unnecessary. Again, the court's inquiry focused entirely on Tanner; it did not address whether the class mechanism would be superior to other available methods of adjudication for the putative class members as a whole.

The court concluded by stating that, "[b]ased on this dearth of information and on the numerous other *concerns regarding Tanner's representation*, the court denies class certification for the Open Market class." (emphasis added). Each finding

that led to the court's decision not to certify the Open Market class was tied to the particular weaknesses of Tanner as a lead plaintiff, and was not necessarily shared by the class itself.

Brothers and the Telco Class

The Northern District of Georgia concluded that Brothers and the putative Telco Class had satisfied the reliance requirement under the § 10(b) and Rule 10b-5 claims because they acquired their WAXS securities in connection with a merger, and there was no evidence that Brothers failed to rely on the market pricing during the merger. However, the court found that Brothers had sold all his shares in WAXS just days after the merger took place. Therefore, not only might Brothers not be able to show that he was harmed by the alleged fraud, the court suggested that he may have actually profited from it due to the resulting inflated stock price. Thus, the court reasoned that Brothers was not an adequate and typical representative of the class because "[i]t would be entirely unfair to tie the fortunes of all potential Telco class members to that of a lead plaintiff who cannot satisfy the basic elements of the claims presented. Due to his sale of stock, Plaintiff Brothers has failed to meet his burden of showing that his claim is typical of those of other class members." As with the Open Market class, the Rule 23 deficiencies cited by the court were entirely Brothers' and did not pertain to the class itself.

Thompson and the NACT Class

The Northern District of Georgia observed that "Thompson and all other members of the putative NACT class relied on the market to valuate properly the WAXS stock in order to achieve a fair exchange for their NACT securities" and that they satisfactorily alleged the elements of the §§ 20(a), 11 and 15 claims. The court concluded, however, that it "need not undergo an intense inquiry into the commonality, typicality, superiority and predominance requirements of [the]

putative class action as Plaintiff Thompson has failed to meet her burden regarding numerosity." The court observed that because Thompson had not provided support for her claims pertaining to numerosity, despite repeated requests from the court, it had "no way of determining whether these millions of shares reside in the hands of a handful of individuals or in the hands of hundreds." The court concluded that it

> would usually deny the NACT class certification without prejudice as numerosity may be proven at a later date. In this case, however, the court has repeatedly requested additional facts and more precise briefing on the issue of class certification. As this is Plaintiff's second attempt at seeking class certification, the court finds that Plaintiff has no excuse for not meeting her burden on the basic grounds of numerosity.

Thus, in contrast to its findings regarding Tanner and the Open Market Class, and Brothers and the Telco class, the Northern District of Georgia did not base its denial of certification to Thompson and the NACT Class on representative-based reasons. Rather, it found that the record did not support a conclusion that the class could satisfy the numerosity requirement. Although the Northern District of Georgia couched its findings in terms of Thompson's failure to meet her burden, what doomed certification for the class was the finding that numerosity was lacking—a class-based determination.

Summary

Despite framing its decision in terms that are more often used to describe class-based characteristics, the Northern District of Georgia's opinion indicates that it based its decision to deny certification to the Open Market and Telco Classes on deficiencies in the lead plaintiffs as representatives

of the class.[8] In the absence of any authority which would make the invocation of a particular Rule 23 requirement definitive as to whether a denial of class certification was class- or representative-based, we evaluate the Northern District of Georgia's opinion as a whole. This review leads us to conclude that the Northern District of Georgia's decision as to the Open Market and Telco classes was based on deficiencies in the lead plaintiffs and not in the class itself, and the District Court's order to the extent it dismisses these class claims will be reversed. The NACT class, however, was denied certification because the evidence showed that the class failed Rule 23's numerosity requirement, a deficiency in the class itself. The District Court's order, to the extent that it denies certification of the NACT class, will be affirmed.

B.

In keeping with our Circuit precedent in *Haas* and *McKowan*, and because we can discern no principled reason to rule otherwise, we hold that where class certification has been denied solely on the basis of the lead plaintiffs' deficiencies as class representatives, and not because of the suitability of the claims for class treatment, *American Pipe* tolling applies to subsequent class actions. Since *American Pipe*, it has been well-settled that would be class members are justified—even encouraged—in relying on a class action to represent their interests with respect to a particular claim or claims, and in refraining from the unnecessary filing of repetitious claims. *See American Pipe*, 414 U.S. at 550, 94 S.Ct. 756. The policy objectives of the class action device—efficient deployment of court resources and the ability to consolidate claims which would otherwise be too small to

[8] It is important to note that this is not a case in which Plaintiffs have attempted to repackage the class-based denial of their claims as being representative-based determinations. Rather, our conclusion rests entirely on the explanation provided by the Northern District of Georgia for its decision.

warrant individual lawsuits—continue to obtain after the rejection by a court of the proposed class representatives.

Drawing the line arbitrarily to allow tolling to apply to individual claims but not to class claims would deny many class plaintiffs with small, potentially meritorious claims the opportunity for redress simply because they were unlucky enough to rely upon an inappropriate lead plaintiff. For many, this would be the end result, while others would file duplicative protective actions in order to preserve their rights lest the class representative be found deficient under Rule 23. Either of these outcomes runs counter to the policy behind Rule 23 and, indeed, to the reasoning employed by the Supreme Court in *American Pipe* and *Crown, Cork & Seal*.

Nor would the objectives of limitations periods be better served were we to hold otherwise. The defendants were on notice of the nature of the claims and the generic identities of the plaintiffs within the required period, eliminating the potential for unfair surprise and prompting them to preserve evidence which might otherwise have been lost.

Allowing tolling to apply to subsequent class actions where the original class was denied because of the lead plaintiffs' deficiencies as class representatives will not lead to the piggybacking or stacking of class action suits "indefinitely" as Defendants argue and as the Eleventh Circuit feared in *Griffin*. Rather, applying tolling under these circumstances will allow subsequent classes to pursue class claims until a court has definitively determined that the claims are not suitable for class treatment. Where repeated tolling is implicated and the class appears unable to put forward an appropriate lead plaintiff, courts may reasonably conclude that the class itself fails Rule 23 analysis. Rather than arbitrarily eliminate the possibly meritorious claims of countless class members, we prefer to see careful case management employed to avoid the prospect of "indefinite" tolling.

We are cognizant of Justice Blackmun's admonition in *American Pipe* that lawyers are not to be encouraged "to frame their pleadings as a class action, intentionally, to attract and save members of the purported class who have slept on their rights." 414 U.S. at 561, 94 S.Ct. 756 (Blackmun, J., concurring). We are also mindful of the warning in *Crown, Cork & Seal* that "[t]he tolling rule of *American Pipe* is a generous one, inviting abuse." 462 U.S. at 354, 103 S.Ct. 2392 (Powell, J., concurring). The rule announced here does not offend these concerns. Allowing tolling in the circumstances described here is unrelated to the warnings expressed in *American Pipe* and *Crown, Cork & Seal*, which concerned the potential for abuse where counsel could manipulate a complaint to trigger tolling. Here, there is no question that these would-be class members would have been eligible for tolling as intervenors under *American Pipe* and as individuals under *Crown, Cork & Seal*. The question, then, is not whether tolling applies but simply how.

Finally, Defendants warn that "[t]his Court should avoid making the district courts in the Third Circuit a haven for unhappy plaintiffs' lawyers who cannot obtain class certification in the original court of their choosing." Rather than inviting forum shopping, we believe our holding will lead to more efficient handling of class actions by encouraging district judges to address the merits of class treatment for putative classes early in Rule 23 proceedings.

CONCLUSION

We hold that *American Pipe* tolling allows litigants whose individual lawsuits would have been timely with the benefit of tolling due to an earlier class action to aggregate their claims in a substantively identical class suit so long as the denial of certification in the earlier action was based solely on Rule 23 deficiencies of the putative representative. We also hold that *American Pipe* tolling does not apply to later class

actions where a substantially identical class suit was denied certification due to a Rule 23 defect in the class itself. Accordingly, we will reverse the District Court's dismissals of the Open Market and Telco classes, affirm the dismissal of the NACT class, and remand this matter to the District Court for further proceedings consistent with this opinion.

ALITO, Circuit Judge, concurring and dissenting.

I join the opinion of the Court insofar as it holds that a prior action in which class certification is denied based solely on deficiencies of the class representative tolls the statute of limitations for filing a later, substantively identical action with a new representative. The logic of our decision in *McKowan Lowe & Co. v. Jasmine Ltd.*, 295 F.3d 380 (3d Cir.), *cert. denied*, 537 U.S. 1088, 123 S.Ct. 691, 154 L.Ed.2d 631 (2002), leads to this conclusion. I therefore agree with the majority that we must reverse the decision of the District Court with respect to the claims of the Telco Class, because class certification of those claims was denied on the ground that the lead plaintiff did not satisfy the typicality requirement of Federal Rule of Civil Procedure 23(a). *See* JA 402. I also agree with the majority that we should affirm the decision of the District Court with respect to the NACT Class because class certification of those claims was based on a class defect.

I disagree with the majority, however, insofar as it reverses the decision of the District Court with respect to the Open Market Class. Our decision in *McKowan Lowe* took pains to make it clear that the statute of limitations should not be tolled by a prior action in which class certification is denied based on "defects in the class itself," rather than "deficiencies" of the class representative. 295 F.3d at 386. Without this restriction on tolling, lawyers seeking to represent a plaintiff class could extend the statute of limitations almost indefinitely until they find a district court judge who is willing to certify the class. The lawyers could simply file a new, substantively identical action with a new class representative as soon as class certification is denied in the last previous action. *See McKowan Lowe*, 295 F.3d at 386.

In the present case, as the majority notes, Judge Evans of the Northern District of Georgia denied class certification in a "substantively identical suit." Maj. Op. at 99. Judge Evans stated that certification of the Open Market Class was denied

for failure to meet "the typicality, *commonality*, adequacy, and *superiority* requirements." JA 389. Thus, Judge Evans found two fatal defects—lack of "commonality" and "superiority"—that, as the majority acknowledges, are generally "used to describe class-based characteristics." Maj. Op. at 111. Under *McKowan Lowe*, therefore, it would appear that we should hold that the prior action did not toll the statute of limitations with respect to the claims of the Open Market Class.

The majority, however, concludes in effect that Judge Evans, despite the language noted above, actually based her decision regarding the Open Market Class solely on deficiencies of the class representative, not defects in the class. For example, the majority stresses Judge Evans's statement that the proposed representative of the Open Market Class "*failed* . . . to meet *his* burden with regard to the typicality, commonality, adequacy, and superiority requirements." Maj. Op. at 109 (quoting JA 389) (emphasis added in majority opinion).

It is possible that the majority's interpretation of Judge Evans's opinion is correct and that she did not really mean to hold either that there are not "questions of law or fact common to the [Open Market Class]," Fed.R.Civ.P. 23(a)(2), or that class action treatment of the claims of that class would not be "superior to other available methods for the fair and efficient adjudication of the controversy." Fed.R.Civ.P. 23(b)(3). But the fact remains that she stated that the commonality and superiority requirements were not met, and there is no way for us to remand this matter to Judge Evans for her to clarify the precise basis of her ruling.

In cases like this, therefore, we have two choices. We can take at face value the grounds cited by the court that previously denied class certification, or we can look beyond the terms used by that court and attempt to determine whether the court really meant to base its decision on deficiencies of the representative or defects in the class. I would take the former

approach, because I believe that the alternative may lead to problems. Our circuit will attract actions in which courts in other circuits have denied class certification. Even when the courts denying certification state that their decisions are based on defects in the class, the courts of our circuit will be asked to look behind the text of the opinions denying certification and to determine whether the authors of those opinions really meant to say or should have said what they did. We must keep in mind that, in most circuits, the distinction drawn in *McKowan Lowe* between deficiencies in the representative and defects in the class has no bearing on the tolling of the statute of limitations, and therefore district courts in those circuits may not always make it clear whether their rulings rest on representative- or class-based defects. We also should not underestimate the ability of lawyers representing would-be plaintiff classes to recharacterize rulings that, read literally, appear to be class-based.

I would, accordingly, adopt a rule that takes decisions denying class certification at face value. Because I am concerned about the effects of the majority's approach, I must respectfully dissent in part.

APPENDIX B

UNITED STATES DISTRICT COURT
D. NEW JERSEY

Nos. Civ. A. 02-5968(JAP)
Civ. A. 03-725(JAP)

PEDRO YANG, CAROL JACKSON, and PETER S. KELSCH, on behalf of themselves and all persons similarly situated,
Plaintiffs,

v.

STEVEN A. ODOM, MARK GERGEL, HENSLEY E. WEST, MARTIN D. KIDDER and STEPHEN J. CLEARMAN,
Defendants.

JAMES BARBERIAN, and JOSEPH and KAREN KINOSIAN, on behalf of themselves and all persons similarly situated,
Plaintiffs,

v.

STEVEN A. ODOM, MARK GERGEL, HENSLEY E. WEST, MARTIN D. KIDDER and STEPHEN J. CLEARMAN,
Defendants.

June 4, 2003

OPINION

PISANO, District Judge.

I. INTRODUCTION

The instant consolidated actions arise out of allegations that Steven A. Odom, Mark Gergel, Hensley A. West, Martin D. Kidder, and Stephen J. Clearman ("Defendants"), in their capacities as officers and/or directors of World Access, Inc., a publicly held telecommunications company headquartered in Atlanta, Georgia,[1] were "control persons" of that corporation and caused it to commit multiple incidences of securities fraud. Plaintiffs Pedro Yang, Carol Jackson, Peter S. Kelsch, James Barberian, Joseph Kinosian and Karen Kinosian, on their own behalf and as a class action pursuant to Fed.R. Civ.P. 23 assert four causes of action against Defendants, alleging violations of Section 10(b) and Section 20(a) of the Exchange Act, 15 U.S.C. §§ 78j(b) and 78t(a), Rule 10b-5, and Sections 11 and 15 of the Securities Act, 15 U.S.C. §§ 77(k) and 77(*o*).

Presently before this Court is Defendants' Motion to Dismiss on the following grounds: (1) the applicable statute of limitations has expired; (2) the filing of this action is in violation of the "first-filed" rule; and (3) venue is improper. In the alternative, Defendants move for a transfer of venue to the Northern District of Georgia. The Court has federal question jurisdiction pursuant to 28 U.S.C. § 1331. The motion was opposed, and the Court decides the motion without oral argument as permitted by Fed.R. Civ.P. 78. After considering the parties' written submissions, and for all the reasons discussed below, the Court grants Defendants' motion to dismiss on the basis of the statute of limitations. Finding Plaintiffs'

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[1] WAXS is not named as a defendant in this action due to ongoing Chapter 11 proceedings in the United States Bankruptcy Court for the Northern District of Illinois. (Compl.¶ 25).

claims time-barred, the Court declines to address Defendants' other grounds for dismissal or their request for change of venue.

II. BACKGROUND

For the limited purpose of this motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Court accepts as true the facts alleged in the amended complaint and all reasonable inferences drawn from those facts. *See Hayes v. Gross*, 982 F.2d 104, 106 (3d Cir.1992); *see also* infra II. Rule 12(b)(6) Standard. Accordingly, the facts recited below are taken from Plaintiff's Class Action Complaint, and do not represent this Court's factual findings.

Plaintiffs Pedro Yang, a New Jersey resident, Carol Jackson, a Washington resident, and Peter S. Kelsch, a California resident, are the proposed class representatives in the *Yang* action. They seek to represent a class of themselves and all other persons or entities who:

> (i) acquired securities of World Access, Inc. ("WAXS") in the merger of NACT Telecommunications, Inc. ("NACT") into WAXS, which closed on October 29, 1998 . . . (ii) acquired securities of WAXS in the merger of Telco Systems, Inc. ("Telco") into WAXS, which closed on November 30, 1998 . . . or (iii) purchased securities of WAXS in the open market during the period April 29, 1997 through February 11, 1999 who were damaged by defendants' violations of the federal securities laws.

(Compl.¶ 1).[2]

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[2] "Compl." indicates citations to the *Yang* Class Action Complaint, the first-filed complaint in this consolidated action, but all findings of fact and law made by the Court apply to the virtually identical *Barberian* Class Action Complaint.

Plaintiffs claim that during the class period, Defendants "issued materially false and misleading statements and omitted to disclose material information concerning WAXS's products, revenues, earnings, inventory, and sales practices. . . . " (Compl.¶ 2). Plaintiffs further allege that throughout the class period, Defendants "engaged in a common course of conduct that operated as a fraud on the integrity of the market for WAXS securities." (Compl.¶ 3). This conduct allegedly included issuing press releases, financial statements, and other corporate documents that failed to disclose that one of WAXS's products, a telephone switching product known as the "CDX Switch" was a "non-functional development-stage prototype." (Compl.¶ 3).

Plaintiffs make a series of allegations relating to WAXS's CDX Switch. They claim that the company sold defective switches, continued to record revenue in connection with the non-functioning switches, and otherwise conducted business improperly in light of the non-functioning nature of this key product. (Compl. ¶ 3). They also allege that Defendants misrepresented that WAXS was not losing business due to financial conditions in Asia during 1997-1998, materially overstated WAXS's sales, revenues, assets, inventory and earnings, materially understated corporate expenses, and failed to disclose the reasons the company's inventory had ballooned. (Compl.¶ 4).

Plaintiffs charge that as a result of these actions, the market price of WAXS securities traded at artificially inflated levels throughout the class period. (Compl.¶ 7). Finally, Plaintiffs allege that Defendants' fraud resulted in announced earnings substantially less than the previous quarter, and far less than analysts' expectations. (Compl.¶ 6).

Similar allegations have also been made in ongoing securities litigation taking place before the Honorable Orinda D. Evans, Chief Judge for the United States District Court for the Northern District of Georgia, entitled *In re World Access,*

Inc. Securities Litigation, 1:99 CV 43(ODE) (the "Georgia litigation"). That litigation was first filed in January 1999 as a putative class action, but the court has denied motions for class certification on two separate occasions: first by rejecting the parties' stipulated class certification by Order dated July 30, 2001, and then rejecting Plaintiffs' renewed motion for class certification by Order dated July 1, 2002. In its July 1 Order, the court denied certification with prejudice based on the inadequacy of the class representatives. Pls' Ex. H. Plaintiffs then moved for reconsideration of the July 1 Order, which was denied on August 9, 2002. Plaintiffs filed a petition with the United States Court of Appeals for the Eleventh Circuit for interlocutory review of the denial of class certification pursuant to Fed.R.Civ.P. 23(f). That petition was denied on September 17, 2002. Pls' Ex. J. Following the denial of class certification, certain individual plaintiffs continued the litigation. The record reveals that the Georgia litigation has been thus far a massive undertaking by that court, with a docket comprised of several hundred entries.

The instant case is comprised of two actions. The first, filed by Plaintiffs Pedro Yang, Carol Jackson and Peter S. Kelsch was filed on December 17, 2002, bearing the docket number 02-CIV-5968 (JAP). The second, filed on February 14, 2003 by Plaintiffs James Barberian and Karen Kinosian, with allegations virtually identical to the Complaint filed in *Yang*, bears docket number 03-CIV-725 (JAP). The Court consolidated both cases by Order dated March 18, 2003.

Defendants claim that the instant actions are impermissibly repetitive of the Georgia litigation, and are furthermore barred by the one-year statute of limitations for federal securities fraud claims imposed by 15 U.S.C. § 77m.

III. DISCUSSION

Federal Rule of Civil Procedure 12(b)(6) permits a court to dismiss a complaint "for failure to state a claim upon which relief can be granted." On a Rule 12(b)(6) motion, the court will, as it must, accept as true all of the factual allegations within the complaint and any reasonable inferences that may be drawn from those allegations. *Nami v. Fauver*, 82 F.3d 63, 65 (3d Cir.1996). Claims will be dismissed under Rule 12(b)(6) only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). Courts may consider a statute of limitations defense in a motion to dismiss "where the complaint facially shows non-compliance with the limitations period and the affirmative defense clearly appears on the face of the pleading." *Jaramillo v. Experian Information Solutions, Inc.*, 155 F.Supp.2d 356, 358-59 (E.D.Pa.2001)

Generally, the court's task requires it to disregard any material beyond the pleadings. *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir.1997); *Pension Benefit Guar. Corp. v. White Consol. Indus.*, 998 F.2d 1192, 1196 (3d Cir.1993). A district court may, however, consider the factual allegations within other documents, including those described or identified in the complaint and matters of public record, if the plaintiff's claims are based upon those documents. *Burlington Coat*, 114 F.3d at 1426; *In re Westinghouse Sec. Litig.* ("*Westinghouse*"), 90 F.3d 696, 707 (3d Cir.1996); *In re Donald Trump Sec. Litig.*, 7 F.3d 357, 368 n. 9 (3d Cir.1993); *Pension Benefit Guar. Corp.*, 998 F.2d at 1196. Yet just because the court elects to examine these types of documents outside of the complaint does not mean that it need treat the motion as one for summary judgment. *Burlington Coat*, 114 F.3d at 1426; *Pension Benefit Guar. Corp.*, 998 F.2d at 1196-97.

Defendants seek dismissal of Plaintiffs' Class Action Complaint on multiple grounds: (1) the applicable statute of limitations has expired; (2) the filing of this action is in violation of the "first-filed" rule; and (3) venue is improper. In the alternative, Defendants move for a transfer of venue to the Northern District of Georgia. Because the Court finds the statute of limitations bars filing of this action in the District of New Jersey, it shall not address Defendants' other arguments.

Plaintiffs bring claims pursuant to Sections 11 and 15 of the Securities Act, 15 U.S.C. §§ 77(k) and 77(*o*), and Sections 10(b) and 20(a) of the Exchange Act, 15 U.S.C. §§ 78j(b) and 78t(a). 15 U.S.C. § 77m of the Securities Act sets forth a one-year period to file federal securities fraud claims; this period commences to run on the date of inquiry notice to prospective plaintiffs. *See* 15 U.S.C. § 77m (allowing "one year after the discovery of the untrue statement or omission, or after such discovery should have been made by the exercise of reasonable diligence," to file suit). *See also In re NAHC, Inc. Secs. Litig.*, 306 F.3d 1314 (3d Cir.2002). Defendants argue that this period commenced to run no later than January 5, 1999, the date that WAXS disclosed its earnings were going to be less than projected. *See* Compl. ¶¶ 5, 166. After reviewing the Complaint, the Court agrees with this assessment, and finds that the statutory period began to run on January 5, 1999.[3] By extension, therefore, Plaintiffs' Complaint, which was filed on December 17, 2002, is almost two years out of time, absent any tolling.

Plaintiffs argue that the statute of limitations has been effectively tolled by the rule articulated by the United States Supreme Court in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974), and as enunciated by the Third Circuit's opinion in *McKowan*

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[3] Plaintiffs concede that their Complaint has been filed outside the statutory limitations period absent tolling. Pb. at 16-18.

Lowe v. Jasmine Ltd., 295 F.3d 380 (3d Cir.2002). The *American Pipe* rule provides that when a class action complaint is filed, the statute of limitations is tolled for all members of that putative class who then choose to intervene or file an independent action following a denial of class certification. *See American Pipe*, 414 U.S. at 555, 94 S.Ct. 756 ("Not until the existence and limits of the class have been established and notice of membership has been sent does a class member have any duty to take note of the suit. . . . "). *See also Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 350, 103 S.Ct. 2392, 76 L.Ed.2d 628 (1983) (extending *American Pipe* tolling to subsequent individual actions filed after the denial of class certification).

American Pipe has been interpreted by most courts considering the issue as holding that "stacking" one class action atop another following a denial of class certification is prohibited. *See, e.g., Korwek v. Hunt*, 827 F.2d 874, 879 (2d Cir.1987) ("filing new but repetitive complaints" not intended by Supreme Court in *American Pipe*). *See also Basch v. Ground Round, Inc.*, 139 F.3d 6, 11 (1st Cir.1998); *Griffin v. Singletary*, 17 F.3d 356, 359 (11th Cir.1994); *Andrews v. Orr*, 851 F.2d 146, 149 (6th Cir.1988); *Robbin v. Fluor Corp.*, 835 F.2d 213, 214 (9th Cir.1987). This has been called the "anti-stacking" rule.

As a matter of first impression, in *McKowan Lowe* the Third Circuit considered the breadth of the *American Pipe* rule as applied to a plaintiff seeking to intervene in a securities fraud class action after the statute of limitations had expired. In that case, the plaintiff, a shareholder of Jasmine Ltd., a shoe company, filed suit against the corporation, its management, underwriter and principals, as well as other entities, all in relation to an initial public offering of Jasmine stock. *See McKowan Lowe*, 295 F.3d at 383. The complaint, filed by Harry Berger on his own behalf and on the behalf of all others similarly situated, alleged that defendants misstated

Jasmine's financial statements to conceal debt owed to another corporation. *Id.* The court denied Berger's request for class certification based on its analysis that he did not meet the adequacy requirements of Fed.R.Civ.P. 23. *Id.* Shortly after the denial of class certification, but more than three years after the complaint was first filed, Bernard Cutler intervened as a plaintiff. But for the tolling rule enunciated in *American Pipe*, Cutler's claims would have been barred by the one year statute of limitations for such securities fraud actions.

The Third Circuit determined that Cutler could benefit from *American Pipe* tolling because the class certification motion of his predecessor, Mr. Berger, was denied not due to any defects in the class itself, but due to Berger's inadequacy as a class representative. *Id.* at 386. In so deciding, the court closely examined case law from the Second Circuit, *see Korwek v. Hunt*, 827 F.2d 874 (2d Cir.1987), and the Eleventh Circuit, *see Griffin v. Singletary*, 17 F.3d 356 (11th Cir.1994). The circuit court distinguished *Korwek* as applying to instances where a court has found the class itself inappropriate, not due to any perceived deficiencies in the class representative herself. The Third Circuit found that while the class in *Griffin* was denied due to the inadequacy of the class representative, the distinction illuminated in *Korwek* was ignored by that court. The court found that the reasons for the denial of class certification were significant to its decision, and keeping with Third Circuit precedent in *Haas v. Pittsburgh Nat'l Bank*, 526 F.2d 1083 (3d Cir.1975) (allowing *American Pipe* tolling for a subsequent class representative on a claim that the initial representative lacked standing to pursue), allowed Cutler to intervene.

However, the circuit court's holding was not without limits: the court clearly stated "we hold that the class claims of *intervening class members* are tolled if a district court declines to certify a class for reasons unrelated to the appro-

priateness of the substantive claims for certification." *Id.* at 389 (emphasis added).

However, neither the Supreme Court nor the Third Circuit has yet addressed whether the tolling rule permits the filing of a new class action in a different district court after the statutory period has expired. Plaintiffs argue that *McKowan Lowe* should be read as creating a broad exception to the "anti-stacking" rule, one that allows the filing of subsequent class actions by new plaintiffs in different districts, not only claims filed by intervenors. Defendants argue that the plain language of the Third Circuit's holding limits the breadth of the *American Pipe* tolling exception to subsequent claims filed by intervenors, and does not toll the statute of limitations for a new action filed in a different district court, as is the case here. The Court agrees with Defendants. The *American Pipe* tolling rule is an exception to the statute of limitations already in operation.[4] *McKowan Lowe* provides an enunciation of that exception in the Third Circuit: claims of intervening class members are entitled to a tolling of the statute of limitations while class proceedings are ongoing.[5]

In support of their motion, Defendants cite the Ninth Circuit's conclusion in *Robbin v. Fluor Corp.*, 835 F.2d 213 (9th Cir.1987), where the court refused to allow a separate

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[4] "Notably, the holdings in both *American Pipe* and *Crown, Cork & Seal* were not based on judge-made equitable tolling, but rather on the Court's interpretation of Rule 23." *Vinson v. Seven Seventeen HB Phila. Corp.*, Civ. No. 00-6334, 2001 WL 1774073, at *6 n. 4 (E.D.Pa. Oct.31, 2001) (citations omitted).

[5] Plaintiffs rebut that Defendants are "vainly" trying to limit the holding of *McKowan Lowe* to intervenors. Pb. at 19. (arguing further that "Defendants provide no rationale for distinguishing between intervenors and those who file a second action . . . *McKowan* gave no indication that its rationale would not apply to the filing of a second action."). The Court finds that Defendants are correct in their recitation of the holding in *McKowan* and their efforts are not in vain.

class action to proceed in the Central District of California after a virtually identical class had been denied certification in New York. In that case, the Ninth Circuit rejected plaintiffs' arguments that *American Pipe* tolling applied to subsequent class actions filed in other courts. *Id.* at 214.

Plaintiffs argue that *Robbin* is inapposite because the Ninth Circuit does not have the benefit of the *McKowan Lowe* decision. However, the same result is required here, and *McKowan Lowe* does not change the analysis markedly. In fact, as discussed *supra*, the holding of the Third Circuit in *McKowan Lowe* is clear: in this Circuit, *American Pipe* tolls the class claims of *intervening* class members. As Plaintiffs are not intervenors, and have filed a separate class action here in the District of New Jersey despite the ongoing proceedings in the Northern District of Georgia, the *McKowan Lowe* decision does not mandate tolling. It is not the function of this Court to unnecessarily depart from the clear holding of the Third Circuit in *McKowan Lowe* and extend *American Pipe* tolling to the instant time-barred action. Therefore, as Plaintiffs are not within the scope of the *American Pipe/ McKowan Lowe* tolling exception, the statute of limitations bars their claims.

IV. CONCLUSION

As this determination is dispositive of Plaintiffs' entire Class Action Complaint, the Court declines to address the other arguments for dismissal and/or transfer set forth in Defendants' motion.

An appropriate order follows.

ORDER

Before the Court is the motion of Defendants Steven A. Odom, Mark Gergel, Hensley E. West, Martin D. Kidder and Stephen J. Clearman to dismiss the Class Action Complaints in the above-captioned actions under Rule 12(b)(6) of the

Federal Rules of Civil Procedure. For the reasons set forth in the accompanying written opinion,

ORDERED that Defendants' motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure is GRANTED; and it is further,

ORDERED that the Class Action Complaints are dismissed with prejudice.

This cases bearing the Civil Action Numbers above are CLOSED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

[Filed Aug. 9, 2002]

CIVIL ACTION NO. 1:99-CV-43-ODE

IN RE: WORLD ACCESS, INC.
SECURITIES LITIGATION

ORDER

This securities litigation action is presently before the court on Lead Plaintiffs' Motion for Reconsideration of this court's July 1, 2002, order denying class certification. For the reasons discussed below, Lead Plaintiffs' Motion for Reconsideration is DENIED.

Facts

The facts of this case are more fully outlined in this court's July 1, 2002 order. Lead Plaintiffs filed a renewed motion for class certification on January 9, 2002. Plaintiffs' first attempt at garnering class certification—a stipulated conditional certification—failed to satisfy the conditions imposed by Rule 23 of the Federal Rules of Civil Procedure. The court, in its July 26, 2001 order, noted that Plaintiffs had not established enough factual support to show that the putative classes met the typicality, commonality, adequacy, superiority and predominance requirements of Rule 23. The court, however, granted Plaintiffs another opportunity to gain class certification, and Plaintiffs renewed their motion on January 9, 2002.

This court denied class certification again in its July 1, 2002 order in which the court determined that Plaintiffs had

failed, yet again, to provide enough factual evidence to meet their burden under Rule 23. Specifically, the court noted that Plaintiff Tanner did not satisfy the typicality requirements due to his large purchase of WAXS shares on January 5, 1999, despite the press release issued by WAXS giving partial indication of the alleged scheme of inflation in stock price. The court also noted that Plaintiff Thompson had failed to satisfy the numerosity requirement, as she had presented the court with evidence of only sixteen potential class members. The court finally noted that Plaintiff Brothers failed to meet his burden of typicality as he had sold his WAXS shares almost immediately after acquiring them in the Telco merger, thereby benefitting from the alleged inflationary scheme. Plaintiffs now urge this court to reconsider its ruling on class certification, claiming that the court made incorrect legal and factual findings. As Plaintiffs have not persuaded the court that there has been an intervening change in controlling law, a clear error of fact, or a threat of manifest injustice, the court denies Plaintiffs' motion.

Standard

A motion for reconsideration is reserved for certain limited situations, namely the discovery of new evidence, "an intervening development or change in the controlling law, or the need to correct a clear error or prevent a manifest injustice." *Preserve Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Engineers*, 916 F.Supp. 1557, 1560 (N.D. Ga. 1995); *see also Jersawitz v. People TV*, 71 F.Supp.2d 1330, 1344 (N.D. Ga. 1999).

Plaintiffs assert that the court improperly looked into the merits of the case when determining Plaintiff Tanner's fitness as a class representative and that the court made errors of fact in denying class certification for Plaintiff Thompson and Plaintiff Brothers' putative classes. The arguments concerning Plaintiff Tanner amount to an objection to the court's

interpretation of law and the relevant facts. Such objection is not proper grounds for reconsideration, as Plaintiffs merely dispute the court's findings and have presented no evidence of a change in the law, clear error of fact, or manifest injustice. The court therefore denies reconsideration of Plaintiff Tanner's claims.

The arguments concerning Plaintiff Thompson also amount to an objection to the court's findings of fact. Plaintiffs admit that the record indicated that there were only sixteen holders of record of NACT/WAXS stock. Plaintiffs also admit that they filed only fourteen plaintiff certification forms with the court. Plaintiffs have filed no new evidence to support their claim that there are "millions" of potential class members. Plaintiffs simply dispute the court's findings. Such a dispute does not constitute a change in controlling law, a threat of manifest injustice, or a clear error of fact. The court therefore denies reconsideration of Plaintiff Thompson's claims.

Plaintiffs also dispute the court's finding that Plaintiff Brothers sold his shares shortly after the Telco/WAXS merger. As noted in the July 1, 2002, order, Plaintiff Brothers had been given at least two opportunities to submit the proper factual evidence regarding his holdings of stock to the court. Plaintiff submitted a plaintiff certification form that was at best ambiguous, and Plaintiff failed to clarify the form prior to the entry of the order denying class certification. Plaintiffs have submitted new evidence showing that Plaintiff Brothers did not sell his stock and continues to hold that stock today, arguing that this new evidence indicates that the court made a clear error of fact. While an argument may be made that the court's finding that Plaintiff Brothers did not meet the typicality requirement because of his sale of stock and merits reconsideration based on new evidence, Defendants have produced evidence indicating that Brothers also purchased a large number of WAXS shares after the end of the Class

period. Thus, an argument may be made that Plaintiff Brothers still does not meet the typicality requirements as a result of this late purchase. The court therefore denies reconsideration of Plaintiff Brother's class certification claims.

Plaintiffs have failed to provide the court with evidence of any change in controlling law, any threat of manifest injustice, or any clear error of fact. The Plaintiffs' motion for reconsideration [#74] is DENIED.

SO ORDERED, this 9th day of AUGUST, 2002.

/s/ Orinda D. Evans
ORINDA D. EVANS
UNITED STATED DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

[Filed July 1, 2002]

CIVIL ACTION NO. 1:99-CV-43-ODE

IN RE: WORLD ACCESS, INC.
SECURITIES LITIGATION

ORDER

The instant federal securities litigation alleging violations of §§ 11 and 15 of the Securities Act of 1933 and § 10(b) of the Securities Exchange Act and Rule 10b-5 promulgated thereunder is presently before the court on Lead Plaintiffs' motion for class certification. Lead Plaintiffs Cari Thompson ("Thompson"), John W. Brothers ("Brothers"), and William B. Tanner ("Tanner") seek to represent the following classes (listed in respective order): (I) all persons who acquired securities of World Access, Inc. ("WAXS") in the October 29, 1998, merger of NACT Telecommunications, Inc. ("NACT") into WAXS; (ii) all persons who acquired securities of WAXS in the November 30, 1998, merger of Telco Systems, Inc. ("Telco") into WAXS; and (iii) all persons who purchased securities of WAXS in the open market during the period April 29, 1997 through February 11, 1999, who were damaged by Defendants' violations of the federal securities laws. For the reasons stated below, the court denies Plaintiffs' motion with prejudice.

Summary of Relevant Facts[1]

World Access, Inc. ("WAXS") is engaged in the development, manufacturing and marketing of wireline and wireless switching, transport and access products. (Amended Complaint, ¶ 17). In early 1997, WAXS unveiled a new proprietary product known as the CDX switch, which was supposed to allow telecommunications companies to provide advanced services. Much of the instant litigation revolves around this flagship product, the CDX switch. On April 29, 1997, the first day of the class period, WAXS announced the shipment of its first CDX switch, together with a related product known as the WLL-2000, to Hondutel, a Honduran telecommunications provider. WAXS' press release proclaimed that "test results to date in Honduras have been quite encouraging and we continue to believe that these new proprietary international products will begin generating significant new sales and further improvements in gross profit margins for the company beginning in the second half of 1997." (Amended Complaint, ¶ 39).

In the complaint, Plaintiffs allege that Defendants failed to inform the investing public that the CDX switch was little more than a non-functional, incomplete prototype. (*Id.* at ¶¶ 35, 40). Additionally, Plaintiffs allege that the CDX switch failed to comply with international standards and did not function as represented because, among other things:

> —Low audio problems resulted from having low voltage on the subscriber lines;
>
> —Four percent of all calls were dropped for no known reason, 1000 times in excess of industry standards;

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[1] The following facts are taken from this court's order of March 28, 2000, denying Defendant's motion to dismiss the consolidated amended class action complaint. The facts in that order were taken primarily from Plaintiffs' amended complaint.

—The switch held calls for as much as 45 seconds after the customer had disconnected;

—Calls experienced "audio popping";

—MFC Protocol was very slow, requiring four seconds per "hop" in the network; and

—The CDX switch did not support the ISDN or C7 protocols. (*Id.* at ¶ 45). Plaintiffs state that, although the CDX switch was unable to perform its intended applications, WAXS nevertheless shipped incomplete, non-functional merchandise to its customers. Also, WAXS continued to issue upbeat pronouncements on the switch and its prospects. On July 29, 1997, WAXS issued a press release announcing the company's second quarter 1997 financial results. In the July 29, 1997 press release, WAXS stated:

> CDX and WLL-2000 sales for the quarter were approximately $500,000, primarily from a successful first office application agreement with Hondutel. Feedback from several international customers has been encouraging and we continue to believe these new international products will generate significant new sales for the Company beginning in the second half of 1997. Specifically, the Company has recently entered into an agreement with a private network operator in El Salvador for the deployment of 40,000 lines of phone service over the next two years utilizing the CDX switch.

(Amended Complaint, ¶ 49). Allegedly, based on WAXS' representation, an analyst at Alex Brown & Company issued a report rating WAXS stock as a "strong buy" and stating "[t]he company believes the Latin American [CDX small Central Office] CO switch opportunity is 2-3 million lines at $200/line or a $400-$500 million opportunity." (*Id.* at ¶ 50).

Plaintiffs allege that as a result of this information, there was a dramatic response by investors. At the end of April

1997, WAXS stock closed at $9.75 per share. By May 30, 1997, the price had risen to $16.63 per share and closed at $20.50 by June 30, 1997. (*Id.* at ¶ 46). In their complaint, Plaintiffs allege that the Defendants took advantage of this increase in share price, collectively selling portions of their holdings, totaling over $34 million. (*Id.* at ¶¶ 47, 57).

On October 27, 1997, WAXS issued a press release reporting its financial results for the third quarter of 1997. In that report, Defendants reported $1.8 million in CDX sales and said such sales were responsible, in part, for an increase in gross profit margins from 29.4% in the third quarter of 1996 to 37.9% in the third quarter of 1997. (*Id.* at ¶ 61).

On March 5, 1998, Defendants issued a press release reporting its financial results for the fourth quarter as well as year end 1997. Defendants reported total sales of more than $92 million, an 82% increase from the previous year. With respect to the CDX switch, the press release stated, "[d]uring the second half of 1997, the Company sold approximately 6.5 million of its two new international products," the CDX and the WLL-2000. The report continued, stating that "[b]ased on the strength of several new contracts, we expect the sales of these new products to continue to increase during 1998." (¶¶ 71-72).

In the complaint, Plaintiffs allege that WAXS and Defendants artificially inflated the accounts receivable, inventories, total assets, sales, gross profit, operating income, and net income by failing to disclose the non-functional nature of the CDX switch. (¶¶ 3, 80). Specifically, the complaint alleges that customers who had received the non-functional CDX switches refused to pay for them, but WAXS failed to increase its reserves for doubtful accounts and continued to recognize revenue on CDX sales even though collection of the payment was unlikely. Plaintiffs also allege that, in order to hide increasing inventory, WAXS engaged in improper "bill and hold" transactions, shipping product to a nearby

warehouse and recognizing revenue upon the shipments. (¶ 81(f)).

Based on WAXS' apparent positive financial performance, as well as continued purported high expectations for the CDX switch, analysts continued to recommend purchase of its stock. (¶¶ 85-87). In fact, on March 13, 1998, Wheat First Union ("Wheat") issued a report highlighting the positive contribution the CDX switch made to the Defendants' revenues:

> We believe that the CDX switch and the WLL-2000 contributed approximately $3.9 million to revenues in Q4'97, up from $2.0 million in Q3'97. . . The GCA Telecom systems contract valued at $20 million, that was announced on March 5, 1998, includes provisions for a number of CDX switches which gives us a higher confidence in our estimates for sales going forward.

(¶ 75).

On May 11, 1998, following Defendants' first quarter earnings announcement, Prudential Securities ("Prudential") issued a report which, while noting a sequential dip in CDX sales for the first quarter, nevertheless continued to be positive on CDX prospects based on information received from WAXS management. In part, the Prudential report stated:

> We continue to believe that CDX sales will be up strongly this year based on recent bid activity, together with the fact that the company continues to ship products to existing CDX customers in Latin America. It is important to note that sales of the CDX tend to be lumpy in nature which should become less of an issue going forward as the Company continues to add more customers.

(¶ 87).

On July 29, 1998, WAXS issued a press release reporting its financial results for the second quarter of 1998. The

Company reported a 98% increase in total sales and an 89% increase in net income over the same quarter of 1997. (¶ 91). WAXS management informed analysts that the Company realized $5 million in revenue from CDX and WLL-2000 sales during the quarter. (¶ 92).

During the Fall of 1998, WAXS' stock price temporarily stalled in response to an industry wide slowdown. Between September 28, 1998 and October 8, 1998, WAXS stock plunged by 43%, falling from $22.50 to $12.75. (¶¶ 130-33). In response to this decline, Defendant Odom was quoted as saying "[w]e were surprised by the decline in our stock price during the last few days. Our core business continues to be strong and on target for the year." (¶ 137).

On October 26, 1998, WAXS announced record third quarter financial results, with sales increasing by 96% over sales in the third quarter of 1997. In its press release, WAXS represented that "[w]e continue to see significant demand for our wireless products, especially in international markets." (¶ 138). In the complaint, Plaintiffs allege that WAXS did not reveal that its inventories had mushroomed by nearly 300% during the third quarter. Instead, Plaintiffs allege that Defendants claimed that WAXS was "ramping inventory" to meet anticipated increases in demand. (¶¶ 140-42).

Accordingly Plaintiffs' complaint alleges that Defendants' false and misleading statements concerning the third quarter financial results, the ballooning inventory, and the anticipated demand for its products resulted in a strong rebound of the stock price. (¶¶ 138-43). WAXS' stock price closed near $17 on October 25, 1998 and traded in the range of $23 the following week. (¶ 143). As a result, WAXS completed an acquisition of NACT Telecommunications, Inc. ["NACT"] on October 29, 1998 and also completed an acquisition of Telco Systems, Inc. ["Telco"] on November 30, 1998. Each registration statement/prospectus filed in connection with those transactions, Plaintiffs allege, repeated all of the false and

misleading information that had previously been disseminated by Defendants. (¶¶ 98-129). During November 1998, Defendants Kidder and Gergel sold over 80,000 shares of WAXS stock for over $1.8 million. (¶¶ 146-47). Meanwhile, Plaintiffs allege that WAXS' senior management, including Defendant West, were meeting with representatives of GCA Telecom, a network operator in El Salvador, concerning the defective CDX switch in an effort to convince GCA Telecom not to cancel its contract and to prevent a threatened lawsuit. (¶ 148).

On January 5, 1999, WAXS issued a press release announcing that it expected to report fourth quarter diluted earnings per share before special charges of $0.15, compared to analysts' estimates of $0.31 per share. (¶ 158). The Company cited "lack of any significant sales" of the CDX switch as a primary reason for the shortfall. WAXS also disclosed that it had sold nearly $10 million of Northern Telecom equipment at cost in order to reduce inventories and to make up for the lost CDX revenue. (¶ 158). As a result of this announcement, WAXS' stock dropped by nearly $9 per share, or 42%, to a 52 week low of $12.38 per share. (¶ 160). Despite this decline, Plaintiffs allege that Defendants did not acknowledge that customers had received non-functional switches, but instead portrayed the shortfall as a result of a delay in CDX orders of a few customers. (¶162).

On February 11, 1999, Defendants reported fourth quarter net income from continuing operations of $0.08 per share. (¶ 163). This number, however, did not include a loss for the quarter of $0.30 per share relating to discontinued operations, which the company described as consisting of the resale of Northern Telecom equipment and repair and refurbishment of third party equipment. (¶ 163).

Special fourth quarter charges of $92.6 million included "$36.1 million of costs associated with facilities consolidation, the outsourcing of manufacturing facilities, product ra-

tionalization and other strategic initiatives . . ." (¶ 164). The "product rationalization" charges included the establishment of reserves for product obsolescence and doubtful accounts relating to the CDX switch and its apparent phase-out as a stand-alone product. With respect to this development, the Company stated:

> In line with our recent decision to integrate the Class 5 functionality of the CDX switch and the Class 4 functionality of NACT's STX switch into a next generation technology platform, reserves for potential doubtful accounts and potential inventory obsolescence were established to minimize the Company's balance sheet exposure to the CDX switch.

(¶ 164). After this statement, by noon on February 12, 1999, WAXS' shares had dropped from the previous day's closing price of $11.50 to $8.00 per share, a decrease of 30%. (¶ 165).

On April 9, 1999 WAXS filed its Form 10-k for 1998, which revealed that customers had experienced "performance difficulties" with the CDX switch and that it had dramatically reduced its forecast of 1999 CDX revenues. As a result, WAXS incurred substantial write-downs of CDX inventory and established substantial reserves for uncollectible CDX receivables. (¶ 167). These charges were outlined by Defendants in a footnote which read:

> The most significant component of the restructuring charges related to a change in the Company's long-term focus for its switching products, primarily its [CDX] switch. In January 1999, the Company elected to reallocate development resources targeted for the CDX switch as a stand-alone product to the integration of the central office functionality of NACT's switch into a common, next-generation technology platform. This strategic decision, performance difficulties experienced by certain customers' applications of the CDX switch in 1998, and dramatically reduced internal estimates for CDX switch

> revenues in 1999 caused the Company to significantly write-down all CDX related assets as of December 31, 1998 . . .

(¶ 167)

Through these series of announcements at the end of the class period, Plaintiffs allege that WAXS admitted that it had made no "significant sales" of the CDX switch during the fourth quarter of 1998, its internal estimates of CDX switch sales for 1999 had been "dramatically reduced," and its customers had experienced "performance difficulties" with the switch. As a result, WAXS was forced to incur a $23.6 million charge in that quarter in connection with the CDX switch. After these announcements, WAXS' stock price dropped to 8 3/16 per share, after trading as high as 38 5/16 during the class period. This decline precipitated Plaintiffs' investigation and ultimately the instant litigation which Plaintiffs now seek to have certified as a class action.

Procedural History

Various complaints were filed between January 7, 1999 and April 28. 1999. On April 28, 1999, this court entered an order consolidating all suits under the case name *In re World Access Securities Litigation*. This court appointed Plaintiffs Tanner, Thompson, and Brothers as Lead Plaintiffs on March 29, 2001. In that order, the court specifically refused to engage in any analysis of Federal Rules of Civil Procedure 23 governing class certification requirements. The court determined only that the designated Lead Plaintiffs appeared to have been the first to satisfy the heightened pleading requirements for securities class actions and appeared initially to have the largest financial stake in the outcome of the litigation.

Lead Plaintiffs and other putative lead plaintiffs filed several motions for class certification prior to the March 29, 2001 order. This court refrained from engaging in any class

certification analysis until it had made a decision on Lead Plaintiff appointment. On April 10, 2001, soon after this court had made its Lead Plaintiffs decision, WAXS filed a notice of bankruptcy petition and automatic stay of proceedings. Accordingly, all litigation against WAXS itself has been suspended, and the present action is only against the individual defendants named in the amended complaint.

Lead Plaintiffs first filed their motion for class certification on April 18, 2001. On July 25, 2001, however, Lead Plaintiffs and Defendants entered a stipulation and proposed consent order for class certification. The court rejected the stipulation on July 26, 2001, stating that the parties had failed to make an appropriate showing that the requirements of Rule 23 had been met in this case. Lead Plaintiffs filed a renewed motion for class certification on January 9, 2002, rendering moot the April 18, 2001 motion. This order refers only to the January 9, 2002 motion for class certification.

Plaintiffs

William B. Tanner has been designated as the Lead Plaintiff representing all putative class members who purchased securities of WAXS in the open market during the period from April 29, 1997, through February 11, 1999, who were damaged by Defendants' violation of the federal securities laws. [hereinafter referred to as the "Open Market Class"] Mr. Tanner first purchased WAXS shares in April 1998 and engaged in 114 transactions during the ten month period from April 1998 to February 1999. By February 1999, Plaintiff Tanner had sold the majority of his shares. As a result of WAXS' alleged wrongdoing Tanner lost approximately $11 million dollars.[2]

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[2] Tanner purchased securities under the following names: Tanner Equities LLC/Prudential, Tanner Equities/Comprehensive, Tanner Investment Company/Prudential, William B. Tanner/Alex Brown, William B. Tanner/Comprehensive, William B. Tanner/Interstate, William B. Tanner/

On behalf of himself and the Open Market class, Plaintiff Tanner is asserting that all defendants violated § 10(b) of the Securities Exchange Act of 1933 and Rule 10b-5 promulgated thereunder. Plaintiff Tanner also claims that Defendants are liable under § 20(a) of the Securities Exchange Act as controlling persons.

John W. Brothers has been designated as the Lead Plaintiff representing all putative class members who acquired securities of WAXS in the November 30, 1998, merger of Telco into WAXS [hereinafter referred to as the "Telco class"]. Plaintiff Brothers owned a total of 5,940 shares in Telco which he exchanged for 3,481 WAXS shares when in the merger. On behalf of himself and all other members of the putative Telco class, Plaintiff Brothers asserts that Defendants violated § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder and are liable as controlling persons under § 20(a) of that Act. He also claims that Defendants have violated § 11 of the Securities Act of 1933 and are liable as controlling persons under § 15 of that Act.

Cari Thompson has been designated as the Lead Plaintiff for all putative class members who acquired securities of WAXS in the October 29, 1998, merger of NACT into WAXS [hereinafter referred to as the "NACT class"]. Thompson owned 262 NACT shares which she exchanged for an undetermined number of WAXS shares. Neither Thompson nor Brothers purchased any WAXS securities on the open market from April 1997 to February 1999.

On behalf of herself and the putative NACT class, Thompson asserts that Defendants have violated § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder and are liable as controlling persons under § 20(a)

Prudential, Crystal Melody Tanner/Bear Stearns, William Blake Tanner, Jr./Bear Stearns, Weatherly Blake Tanner/Bear Stearns, William Taylor Tanner/Bear Stearns, and Pearline Tanner/Bear Stearns.

of that Act. Plaintiff Thompson also claims that Defendants have violated § 11 of the Securities Act of 1933 and are liable as controlling persons under § 15 of that Act.

Defendants[3]

Defendant Steven A. Odom ("Odom") was the Chairman and Chief Executive Officer of WAXS and served in these positions at all times relevant hereto. According to Plaintiffs' complaint, Defendant Odom signed the allegedly materially false and misleading: (i) 1996 Annual Report and Form 10-K for the year ended December 31, 1997; (ii) NACT Registration Statement, which was disseminated on October 6, 1998; and (iii) Telco Registration Statement, which was disseminated on November 9, 1998. Odom joined the Company's Board in October 1994. In November 1994, he was appointed Chairman of the Board. In August 1995, he became Chairman and Chief Executive Officer of WAXS and served in that capacity until December 1998, when he resigned as Chief Executive Officer. During the Class period, Odom allegedly sold 161,000 WAXS shares at artificially inflated prices, garnering proceeds of over $4 million. Plaintiffs allege that these transactions were unusual in their timing and amounts, as Odom had sold only 1,000 WAXS shares prior to April 1997.

Defendant Mark Gergel ("Gergel") is the Chief Financial Officer and an Executive Vice President of the Company and served in these positions at all times relevant to this matter. According to Plaintiffs' complaint, Defendant Gergel signed the allegedly materially false and misleading: (i) Form 10-K for the year ended December 31, 1997, and Forms 10-Q for the quarters ended June 30, 1997, September, 1997, and March 31, 1998; (ii) NACT Registration Statement; and (iii) Telco Registration Statement. Gergel joined the Com-

[3] All facts regarding Defendants and their positions in WAXS have been taken from Plaintiffs' Amended Complaint and are assumed to be true at this time.

pany in April 1992 as Vice President and Chief Financial Officer. In December 1996, he was named an Executive Vice President of the Company and in December 1998, he was elected a director of WAXS. As disclosed in the WAXS' Proxy statement, filed as of April 30, 1999, prior to joining WAXS, Gergel had been employed by the international accounting firm of Ernst & Young and is a Certified Public Accountant. Allegedly, during the class period, Gergel sold 142,289 WAXS shares (over 90% of his holdings), garnering proceeds of approximately $3 million. Plaintiffs assert that these transactions were unusual in their timing and amounts as Gergel had never sold any of his holdings in WAXS prior to the class period.

Defendant Hensley E. West ("West") was the President, Chief Operating Officer, and a director of WAXS and served in these positions at all times relevant to this matter. According to Plaintiffs' complaint, Defendant West signed the allegedly materially false and misleading: (i) 1996 Annual Report and Form 10-K for the year ending December 31, 1997; (ii) NACT Registration Statement; and (iii) Telco Registration Statement. West served as President and Chief Operating Officer of the company from January 1996 to December 1998, when he was demoted to President of the Company's Equipment Group. Allegedly, during the class period, West sold 87,500 of his WAXS shares (over 80% of his holdings), garnering proceeds of $2,286,375. Plaintiffs allege that these transactions were unusual in their timing and amounts, as West had never sold any of his WAXS holdings prior to April 1997.

Defendant Martin D. Kidder ("Kidder") is the Principal Accounting Officer, Controller, Secretary of the Board of Directors, and a Vice President of WAXS and served in these positions at all times relevant to this matter. According to Plaintiffs' complaint, Defendant Kidder signed the allegedly materially false and misleading: (i) Form 10-K for the year

ended December 31, 1997, and Forms 10-Q for the quarters ended June 30, 1998, and September 30, 1998; (ii) NACT Registration Statement; and (iii) Telco Registration Statements. Kidder joined WAXS in May 1992 as its Corporate Controller. In June 1997, he was promoted to Vice President and Controller. Prior to working at WAXS, Kidder was employed by the international accounting firm of Coopers & Lybrand and is a Certified Public Accountant. According to Plaintiffs, during the Class Period, Kidder sold over 28,000 WAXS shares (over 93% of his holdings) at artificially inflated prices, garnering proceeds of over $700,000. Plaintiffs assert that these transactions were unusual in their timing and amounts, as Kidder had not sold any of his WAXS holdings prior to April 1997.

Defendant Stephen J. Clearman ("Clearman") is a director of WAXS and served in this position at all times relevant to this matter. According to Plaintiffs' complaint, Defendant Clearman signed the allegedly materially false and misleading: (i) Form 10-K for the year ending December 31, 1997; (ii) NACT Registration Statement; and (iii) Telco Registration Statement. Clearman is a member of the Audit Committee of WAXS' Board of Directors. Plaintiffs assert that, during the class period, Clearman sold over 1.6 million WAXS shares (over 97% of his holdings) at artificially inflated prices, garnering proceeds of over $30 million. Plaintiffs claim that these transactions were unusual in their timing and amounts as Clearman had not sold any of his shares prior to April 1997.

Legal Standards

Lead Plaintiffs seek to have the classes certified under Rule 23 of the Federal Rules of Civil Procedure, which provides in relevant part:

> (a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative

parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

* * * *

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

The burden of establishing the specific prerequisites to a Rule 23 action falls on those seeking certification. *Hudson v. Delta Airlines, Inc.*, 907 F.3d 451, 456 (11th Cir. 1996); *Gilchrist v. Bolger*, 733 F.2d 1551, 1556 (11th Cir. 1984). The court must be satisfied, after a "rigorous analysis," that the requirements of Rule 23(a) have been fulfilled. *Coon v. Georgia Pacific Corp.*, 829 F.2d 1563, 1566 (11th Cir. 1987). While the court should not delve deeply into the merits of the

case, the court is allowed to pierce the veil of the pleadings and look at evidence in order to determine whether class certification is proper. *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 160 (1982) ("sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question").

Rule 23 Prerequisites

1. Rule 23(a)

A. *Numerosity*

In order to satisfy the numerosity requirement, a plaintiff must show that the proposed class is so numerous that joinder of all individual members of the class would be impracticable. Fed.R.Civ.P. 23(a)(1). While plaintiffs are not required to show that it would be impossible to join all members, they must provide evidence sufficient to show that joinder would be "extremely difficult or inconvenient" to all members of the class. *In re Miler Industries, Inc. Securities Litigation*, 186 F.R.D. 680, 685 (N.D. Ga. 1999) (quoting *In re Domestic Air Transp. Antitrust Litig.*, 137 F.R.D. 677, 698 (N.D. Ga. 1991)). There are no hard and fast rules governing the number of potential members sufficient to constitute a class; the United States Court of Appeals for the Eleventh Circuit, nonetheless, has held that more than forty members are adequate to satisfy the numerosity requirement. *Cox v. American Cast Iron Pipe Company Corp.*, 784 F.2d 1546, 1553 (11th Cir. 1986).

B. *Commonality and Typicality under Rule 23(a)(2-3)*

The commonality requirement does not require that all questions of fact and law raised in the action be common. However, "[t]he claims actually litigated in the suit must simply be those fairly represented by the named plaintiffs." *Cox, supra*, 784 F.2d at 1557. An analysis of typicality is similar to commonality, but there is a stronger focus on the

representative named plaintiffs. *See Prado-Steinman ex rel. Prado v. Bush*, 221 F.3d 1266, 1279 (11th Cir. 2000) ("commonality refers to the group characteristics of the class as a whole and typicality refers to the individual characteristics of the named plaintiff in relation to the class")

There is an interrelationship between the Rule 23 requirements of commonality, typicality, and adequacy of representation:

> The commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. Those requirements therefore also tend to merge with the adequacy-of-representation requirement, although the latter requirement also raises concerns about the competency of class counsel and conflicts of interest.

General Telephone Company of the Southwest v. Falcon, 457 U.S. 147, 157 n. 13 (1982).

Thus, sections 23(a)(2) and (a)(3) are calculated to ensure that regardless of whether the class representatives and all class members win and the opposing party loses, or alternatively if the class representatives and class members lose and the opposing party wins, all who are affected on both sides will have had a fair opportunity to have their claims or defenses heard and determined on the merits.

While it is relatively simple to evaluate the merits of a dispute involving one plaintiff and one defendant, fairness to both sides in a class action is a far greater challenge and places considerable responsibility on the court. If a class representative with a weak case loses and individual class members with strong cases are bound by the negative outcome, an injustice will have occurred. Similarly, if a winning

class representative's claim and the class member claims are dissimilar, it may be unjust for the opposing party (usually the Defendant) to be responsible for the claims of class members. The court's responsibility is to make sure that the common bond between the class representatives' claims and those of the class is strong enough so that it is fair for the fortunes of the class members to rise or fall with the fortunes of the class representatives. That is the very purpose of Rule 23 (a) .

i. Commonality

In order to satisfy the "commonality" requirement of 23(a)(2), a plaintiff must demonstrate that there are common questions of law or fact to the class. As another court in this district has held, "the existence of a common nucleus of operative facts" may be "key" to a finding of commonality. *Wells v. HBO & Company*, 1991 WL 131177 (Camp, J.) (N.D. Ga. 1991). While a class action must involve issues susceptible to class-wide proof, there is no requirement that all the questions of law and fact be common. *See Murray v. Auslander*, 244 F.3d 807, 811 (11th Cir. 2001); *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1557 (11th Cir. 1986). "The claims actually litigated in the suit must simply be those fairly represented by the named plaintiffs." *Cox*, 784 F.2d at 1557.

ii. Typicality

Plaintiffs must also demonstrate that their claims are typical of those of the class as a whole. "A class representative must possess the same interest and suffer the same injury as the class members in order to be typical under Rule 23(a)(3)." *Murray*, 244 F.3d at 811. "The typicality requirement may be satisfied despite substantial factual differences, however, when there is a 'strong similarity of legal theories.'" *Id.* (citing *Appleyard v. Wallace*, 754, F.2d 955, 958 (11th Cir. 1985)). Striking factual or legal differences between the lead

plaintiff's claim and the claims of the other members of the class can, however, destroy typicality even when there is a common nucleus of operative fact or a common legal theory, as the representative would no longer be "fairly representing" all members of the class.

C. *Adequate Representation*

Plaintiffs must also prove that they will adequately represent the interests of the class as a whole. This last requirement may be met if the plaintiffs' interests are not contrary to those of the other class members and if plaintiffs' counsel are capable of conducting the litigation and are qualified and experienced. *See, e.g., Kirkpatrick*, 827 F.2d at 726. Thus, the adequacy requirement focuses primarily on ensuring that Plaintiffs have no conflicts of interest and that chosen counsel can be entrusted with the heavy burden of litigating on behalf of all members of the class.

2. Rule 23(b)(3)

The two essential requirements of Rule 23(b)(3) are that the common questions "predominate over any questions affecting only individual members" and that the class action procedure be "superior . . . for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). "In other words, 'the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, must predominate over those issues that are subject only to individualized proof.'" *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1005 (11th Cir. 1997) (citing *Kerr v. City of West Palm Beach*, 875 F.2d 1546, 1557-58 (11th Cir. 1989) (quoting *Nichols v. Mobile Bd. Of Realtors, Inc.*, 675 F.2d 671, 676 (5th Cir. Unit B 1982))). The predominance inquiry under Rule 23(b)(3) is "far more demanding than Rule 23(a)'s commonality requirement." *Id.* (quoting *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 624 (1997)).

As the typicality, numerosity, adequacy, and predominace questions are of central importance to this court's decision, the court will analyze each lead plaintiff's position individually for each claim to ensure that each plaintiff will best protect the interests of his or her representative class.

Tanner and the Open Market Class

Lead Plaintiff Tanner claims that all Defendants violated § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder. Tanner also claims that Defendants are liable as controlling persons under § 20(a) of the Securities Exchange Act.

1. § 10(b) and Rule 10b-5 claims

Section 10(b) of the Securities Exchange Act of 1934 is a catch-all provision designed to prevent fraud not specifically prohibited under other sections of the Exchange Act and the Securities Act of 1933. Section 10(b) makes it unlawful for any person "[t]o use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe." 15 U.S.C. § 78j(b). By the terms of 10(b), no acts are illegal or prohibited unless they violate a rule or regulation promulgated by the SEC. The SEC therefore developed Rule 10b-5 which fleshes out the prohibition outlined in § 10(b). Rule 10b-5 specifically prohibits three types of actions:

> (1) general defrauding "device[s], scheme[s], or artifice[s]"
>
> (2) the making of any untrue statements of material fact or the omission of material fact necessary to make statements not misleading, or
>
> (3) engaging in any act, practice or course of business that operates as a fraud or deceit upon any person in connection with the purchase or sale of any security.

To allege securities fraud under Rule 10b-5(2), a plaintiff must show: 1) a misstatement or omission of a material fact, 2) made with scienter, 3) on which plaintiff relied, 4) that proximately caused his injury. *See Ross v. Bank South, N.A.*, 885 F.2d 723, 728 (11th Cir. 1989) (en banc). Rule 10b-5(1) and (3) do not require explicit misrepresentations, but merely require that the plaintiff demonstrate scienter on the part of defendant, reliance on the part of the plaintiff, and injury proximately caused by defendant's general fraudulent acts or schemes.

"Materially misleading statements or omissions by a defendant constitute the primary element of a Rule 10b-5 violation." *Carley Capital Group v. Deloitte & Touche, L.L.P.*, 27 F. Supp. 2d 1324, 1336 (N.D. Ga. 1998) (citing *Basic Inc. v. Levinson*, 485 U.S. 224, 246-47 (1988)). "A false statement or omission will be considered 'material' if its disclosure would alter the total mix of facts available to an investor and 'if there is a substantial likelihood that a reasonable shareholder would consider it important' to the investment decision." *Id.* (Citing *Goldman v. Belden*, 754 F.2d 1059, 1067 (2d Cir. 1985)).

Scienter is a necessary element of a violation of § 10(b) and Rule 10b-5. *Aaron v. SEC*, 446 U.S. 680, 695 (1980). According to the United States Supreme Court, scienter means "a mental state embracing intent to deceive, manipulate, or defraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194 n. 12 (1976). "A showing of severe recklessness satisfies the scienter requirement." *Ziemba v. Cascade International, Inc.*, 256 F.3d 1194, 1202 (11th Cir. 2001). "Severe recklessness is limited to those highly unreasonable omissions or misrepresentations that involve not merely simple or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and that present a danger of misleading buyers or sellers which is either known to the defendant or is so obvious that the defendant must have been aware of it." *Id.*

(quoting *McDonald v. Alan Bush Brokerage Co.*, 863 F.2d 809, 814 (11th Cir. 1989)). Allegations of motive and opportunity may contribute to an inference of severe recklessness, but cannot, standing alone, demonstrate scienter. *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1285-86 (11th Cir. 1999).

"Reliance is one of the essential elements that a plaintiff must prove to recover in a rule 10b-5 action." *Lipton v. Documation, Inc.*, 734 F.2d 740, 742 (11th Cir. 1984) (citing *Dupuy v. Dupuy*, 551 F.2d 1005 (5th Cir.) *cert. denied*, 434 U.S. 911 (1977)). "Requiring the plaintiff to show that he reasonably relied on the defendants' misrepresentations is a means of establishing the 'causal link between the misrepresentation or omission and the injuries suffered by the private plaintiff,' . . . and of ensuring that the federal securities laws do not expose defendants to limitless liability or become transformed into merely private enforcement mechanisms." *Lipton v. Documation, Inc.*, 734 F.2d 740, 742 (11th Cir. 1984) (quoting *Dupuy v. Dupuy*, 551 F.2d 1005, 1016 (5th Cir.) *cert. denied*, 434 U.S. 911 (1977)).

Reliance is just as important in the class action securities suit as in an individual action. "As in any 10b-5(2) misrepresentation claim, each potential class member must prove reliance on some form of the allegedly misleading information in order to recover." *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 724 (11th Cir. 1987). A lead plaintiff may find it virtually impossible to affirmatively establish reliance on the part of every single class member, thus making class actions under Rule 10b-5 untenable. The Supreme Court of the United States, however, has determined that plaintiff is entitled to a presumption of reliance under the fraud-on-the-market theory in a class action.

"The theory has been viewed as most sound where it is used in the context of class actions to eliminate the necessity of each class member proving subjective reliance and where the securities were traded on a developed and open market, so

that the market prices reflect available information about the corporation." *Lipton v. Documation, Inc.*, 734 F.2d 740, 743 (11th Cir. 1984).

"[R]eliance may be presumed where securities are traded on the open market, subject to the defendant proving that the misrepresentations were not material or that the plaintiff's decision to purchase was or would have been unaffected if he had known the true facts . . . The theory thus actually facilitates Congress' intent in enacting the federal securities law by enabling a purchaser to rely on an expectation that the securities markets are free from fraud." *Lipton v. Documation, Inc.*, 734 F.2d 740, 748 (11th Cir. 1984). In *Basic Inc. v. Levinson*, 484 U.S. 224 (1988), the Supreme Court endorsed the application of the fraud-on-the-market presumption in the open and developed market, holding that "[b]ecause most publicly available information is reflected in market price, an investor's reliance on any public material misrepresentations may be presumed for purposes of a Rule 10b-5 action." 484 U.S. at 247. The Eleventh Circuit has subsequently held that the fraud-on-the-market theory is to be recognized in class actions "alleging that the defendant's deception inflated stock prices in the open market." *Lipton v. Documation, Inc.*, 734 F.2d 740, 747 (11th Cir. 1984)

A plaintiff must "prove both actual causation (transaction causation) and proximate causation (loss causation) to prevail" on a Rule 10b-5 claim. *Carley Capital Group v. Deloitte & Touche, L.L.P.*, 27 F. Supp. 2d 1324, 1340 (N.D. Ga. 1998) (citing *Bruschi v. Brown*, 876 F.2d 1526, 1530 (11th Cir. 1989)). In order to prove transaction causation, a plaintiff may show that the defendants' misrepresentations or omissions induced the plaintiff's investment. *Id.* (citing *In re Checkers Securities Litig.*, 858 F. Supp. 1168, 1177 (M.D. Fla. 1994). In order to prove loss causation, a plaintiff may show that he would not have invested if the truth were known, and that the untruth was reasonably related to the

loss. *Id.* The fraud-on-the-market theory may also address the causation element of a Rule 10b-5 claim, as noted by the Eleventh Circuit in 1984. "'[C]ausation is adequately established in the impersonal stock exchange context by proof of purchase and of the materiality of misrepresentations, without direct proof of reliance. Materiality circumstantially establishes the reliance of some market traders and hence the inflation in the stock price—when the purchase is made the causational chain between defendant's conduct and plaintiff's loss is sufficiently established to make out a prima facie case.'" *Lipton v. Documation, Inc.*, 734 F.2d 740, 747 (11th Cir. 1984) (quoting *Blackie v. Barrack*, 524 F.2d 891, 906 (9th Cir. 1975)).

2. § 20(a) claims

"Under Section 20(a) of the Securities Exchange Act, any person who 'controls' someone who violates the Act is jointly and severally liable for this violation . . . The Securities Exchange Act's implementing regulations define control as 'the possession, direct or indirect, of the power to direct or cause the direction of the management policies of a person.'" *In re Miller Indus. Inc. Securities Litig.*, 12 F. Supp. 2d 1323, 1332-33 (N.D. Ga. 1998). Thus, there can be no liability on the part of controlling persons unless the plaintiff first establishes an underlying violation of the Securities Exchange Act. Plaintiff Tanner has alleged that Defendants were controlling parties, so, provided he and the Open Market Class can satisfy all the requirements of 10b and 10b-5 and Rule 23, there should be no problem in granting class certification on this count.

Analysis:

Plaintiff Tanner has satisfied the numerosity requirement for all relevant claims. The record contains affidavits from more than forty individuals who claim to have an interest in this litigation, a number sufficient for a class. *See Cox*, 784

F.2d at 1553. Tanner has failed, however, to meet his burden with regard to the typicality, commonality, adequacy, and superiority requirements, as described below. For this reason, the court denies Plaintiff Tanner's motion for class certification of the Open Market class.

Plaintiff Tanner asserts that all Defendants used a scheme or device to defraud him and other class members, made misleading statements or omitted material facts, and engaged in a course of business that operated as a fraud upon him and the class in connection with the purchase and/or sale of WAXS securities. Tanner also argues that Defendants were controlling persons of WAXS according § 20(a) of the Securities Exchange Act.

In order to prevail on the class certification issue, Plaintiff Tanner must show that the reliance and causation elements of § 10(b) and Rule 10b-5 are common to the class as a whole and that his specific claim is typical of those of the class. Moreover, Tanner must also show that class litigation is the best method for resolving his claim and the claims of other members, and that he will adequately represent the entire class. These various requirements—commonality, typicality, adequacy and superiority—are all interrelated and serve to ensure that it is fair to tie all class members claims to the success or failure of the lead plaintiff.

Tanner joined the WAXS market in April of 1998, over a year after the Open Market class period began, raising serious doubts as to his ability to represent class members who acquired WAXS shares during the first half of the class period. Moreover, the court has serious doubts as to Tanner's representation of all individuals who were harmed by the alleged misrepresentations based on the fraud-on-the-market theory. The fraud-on-the-market theory grants Tanner and the class only a presumption of reliance which Defendants can rebut by showing that Tanner did not rely on the misrepresentations or that other factors primarily influenced his

decisions to buy and sell. Based on the record before the court, it appears that Tanner did not rely on the alleged misrepresentations when purchasing shares of WAXS on January 5, 1999. Defendants announced in a press release on that date that fourth quarter earnings would be far lower that [sic] predicted and that sales of the CDX switch had been disappointing. As a result of this announcement, WAXS' share price dropped precipitously. Nonetheless, Tanner succeeded in buying approximately 24,000 shares of WAXS stock on that date.

The fraud-on-the-market theory is based upon the idea that a plaintiff may rely on the integrity of the market in making purchases or sales of a security. The theory assumes that the market reflects all available information regarding the security, filters it, and adjusts the market value of the security accordingly, thereby protecting the consumer. Tanner's actions on January 5, 1999 directly counter the premises upon which the fraud-on-the-market theory is based. The WAXS press release indicated that WAXS was performing poorly. Thus, the share price dropped over 42% on that date. The market appeared to have performed its valuation function properly. Tanner, however, apparently determining that the market was wrong about the value of the stock, ignored the market's valuation and chose to purchase 24,000 shares at the low price. Tanner therefore demonstrated that he was not relying on the integrity of the market—that he in fact did not trust the market's valuation. Allowing an individual to represent an entire putative class on the basis of a theory which that individual clearly did not espouse flies in the face of justice.

While Tanner does have a significant interest in the outcome of this litigation and could be presumed to pursue his claims zealously, the court has grave concerns over his ability to represent the entire class' best interests. It does not seem just to this court to tie the future of all open market class

members to Tanner's success or failure when the reliance element of his claim appears so tenuous. Moreover, the court feels that the public policy considerations behind class actions do not support certification of the Open Market class. Tanner has such a large stake in the litigation that he and his counsel have adequate incentive to pursue the claim on an individual basis. It is unclear whether common questions of law and fact predominate as Tanner was not a member of the class for the first half of the class period. It cannot be assumed that Tanner will adequately represent those early members of the class as vigorously as the later members of the class.

Finally, Tanner has presented little evidence as to his individual case and its similarity to the case of the putative class. The record contains only minimal evidence regarding Tanner and his experience as a WAXS shareholder. Based on this dearth of information and on the numerous other concerns regarding Tanner's representation, the court denies class certification for the Open Market class.

Thompson and the NACT Class[4]

1. § 10(b) and Rule 10b-5 claims

As opposed to Tanner, Thompson acquired her artificially inflated WAXS securities in the NACT merger. While the same issues of reliance appear regarding all those putative class members who acquired their WAXS securities from the NACT merger rather than through the open market, the fraud-on-the-market theory is much more applicable in this situation. Thompson and all other members of the putative NACT class relied on the market to valuate properly the WAXS stock in order to achieve a fair exchange for their NACT

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[4] According to Plaintiffs' Renewed Motion for Class Certification, Plaintiffs are no longer pursuing claims under § 12(2) of the Securities Act, despite having first asserted the claim in the consolidated complaint. The court therefore refrains from analyzing whether class certification for § 12(2) claims would be appropriate.

securities. There is no indication that Thompson or NACT members refused to rely on the market. Rather, the entire merger was dependent upon the WAXS shares being valued properly in the market. Therefore, the fraud-on-the-market theory may apply as to these claims, provided Plaintiff Thompson and the NACT class satisfy all other requirements under § 10(b), Rule 10b-5 and Rule 23.

Plaintiff Thompson and the putative NACT class have alleged that Defendants knew of the misleading statements, knew of the failure in the CDX switch, knew of the accounting manipulations, and deliberately inflated the WAXS stock price so as to secure the mergers between WAXS and NACT and Telco. These allegations, if true, certainly rise to the level of scienter in the making of material misstatements on October 29, 1998 and all dates afterwards. Moreover, the consolidated complaint indicates that the shareholders of NACT would not have agreed to the merger had WAXS shares not remained at a high value and that Defendants' actions in inflating the value of WAXS caused Thompson's subsequent loss. Thus, Plaintiff Thompson and the putative NACT class have satisfactorily alleged all elements of § 10b and Rule 10b-5.

The court notes that Plaintiff Thompson may only assert the § 10b and Rule 10b-5 claims for the time period beginning on October 29, 1998, as that is the date on which Thompson and other putative members of the NACT class received shares in WAXS. Thus, the 10b and 10b-5 claims refer only misstatements occurring after October 29, 1998, and class members must show that the alleged scheme of inflating the WAXS stock price was still in place as of October 29, 1998 and continued to harm them through April 1999.

2. § 20(a) claims

Section 20(a) of the Securities Exchange Act of 1934 states that "every person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder shall also be liable jointly and severally . . ." 15 U.S.C. § 78t(a). To state a claim for control person liability under § 20(a) of the ACT, a plaintiff must satisfactorily allege the existence of an underlying securities violation. *Brown v. Enstar Group, Inc.*, 84 F.3d 393, 396-97 (11th Cir. 1996), *cert. denied*, 519 U.S. 1112 (1997). Section 20(a) is therefore dependent upon resolution of § 10(b) and Rule 10b-5. As the court has already determined that the putative class satisfies the elements of a § 10(b) and Rule 10b-5 claim, Plaintiff Thompson and the NACT class need only show that Defendants were controlling persons of the WAXS during the relevant time period—from October 29, 1998 to February 11, 1999.

3. § 11 claims

Section 11 of the Securities Act of 1933 provides purchasers of securities a cause of action against those who sell securities by means of a registration statement or prospectus containing material misstatements or omissions of fact. 15 U.S.C. § 77k. Plaintiff Thompson claims that the NACT Merger Registration Statement and Prospectus contained material misstatements regarding WAXS and omitted material information regarding the failure of the CDX switch. Plaintiff Thompson wishes to represent all shareholders of NACT who exchanged their stock in NACT for WAXS stock in the merger closing on October 29, 1998.

Section 11 does not require evidence of reliance. The elements of a Section 11 claim are that there was a material misstatement of fact in the registration statement and that the plaintiff lost money. *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 381-382 (1998). There is no reliance or

causation requirement, nor must the plaintiff prove scienter on behalf of the defendants. *See id.* Thus, an innocent misstatement of fact can stand as the basis for a section 11 claim. *See id.* In order to satisfy the elements of a § 11 claim, Plaintiff Thompson and the NACT class must simply show that they acquired WAXS shares, lost money, and that the NACT Merger Registration Statement contained a material misstatement or omission of fact.

Plaintiff Thompson avers that she acquired 262 shares of WAXS stock in the NACT merger. According to her Plaintiff Certification form, it appears that she still possessed those shares as of January 5, 1999 and ostensibly lost money. The class complaint also states that the NACT Merger Registration Statement failed to reveal the true state of the CDX switch and the ballooning inventory problems afflicting WAXS. Plaintiff Thompson claims that a vast number of former NACT shareholders have also lost money on the WAXS stock the [sic] acquired under the misleading NACT Merger Registration Statement. Thus, Plaintiff Thompson and the NACT class appear to satisfy the § 11 elements, at least preliminarily.

4. § 15 claims

Section 15 of the Securities Act of 1933 make controlling persons liable for violations of § 11 "with and to the same extent" as the persons they control. 15 U.S.C. § 77o. This claim, like that pursued under § 20(a) of the Exchange Act, is dependant upon a finding of an underlying violation of the Securities Act. Plaintiff Thompson has alleged that the Defendants are controlling persons of WAXS and responsible for underlying Securities Act violations.

Analysis:

The court need not undergo an intense inquiry into the commonality, typicality, superiority and predominance requirements of this putative class action as Plaintiff Thompson

has failed to meet her burden regarding numerosity. Plaintiff Thompson asserts that the owners of NACT common stock received approximately 2.7 million shares of WAXS common stock under the NACT merger Registration Statement and Prospectus. After a thorough review of all evidence in the record, the court can find only 16 potential members of the NACT class, despite Thompson's unsupported claims to the contrary. While the class complaint indicates that 2.7 million WAXS shares changed hands during the NACT merger, the court has no way of determining whether these millions of shares reside in the hands of a handful of individuals or in the hands of hundreds. Plaintiff Thompson has therefore failed to satisfy her burden of proving that the class is so numerous that joinder would be inpracticable. For this reason, the court denies certification of the NACT class.

The court would usually deny the NACT class certification without prejudice as numerosity may be proven at a later date. In this case, however, the court has repeatedly requested additional facts and more precise briefing on the issue of class certification. As this is Plaintiff's second attempt at seeking class certification, the court finds that Plaintiff has no excuse for not meeting her burden on the basic grounds of numerosity. For this reason, the court denies the NACT class certification with prejudice.

Brothers and the Telco Class[5]

1. § 10(b) and Rule 10b-5 claims

Like Plaintiff Thompson and the NACT class, Plaintiff Brothers and the putative Telco class also acquired their WAXS securities at an allegedly inflated price due to Defendants' misrepresentations. The Telco class also relied on

[5] Once again, Plaintiffs have not moved for class certification on their § 12(2) claims under the Securities Act, despite having alleged such a claim in their amended complaint. The court therefore considers that plaintiffs have abandoned any claim for certification under § 12(2).

the market to valuate properly the WAXS stock in order to achieve a fair exchange for their Telco shares. Thus, the fraud-on-the-market theory is applicable to the Telco class, as is the accompanying presumption of reliance. There is no evidence in the record suggesting that Brothers failed to rely on the market during the merger, and the merger appears to have been dependant entirely upon the WAXS share price. Plaintiff Brothers and the Telco class have therefore satisfied the reliance requirement under § 10(b) and Rule 10b-5.

Plaintiff Brothers has also alleged that the Defendants had the requisite scienter on November 30, 1998, and afterwards regarding the alleged misstatements and omissions of material fact. The putative Telco class has therefore satisfied the scienter requirement. The amended complaint also indicates that the Telco merger would not have received Telco shareholders' support had the truth about the WAXS stock been known. Moreover, there is no evidence in the record that the subsequent precipitous drop in WAXS price was a result of anything other than Defendants' misstatements.

A problem arises, however, upon closer examination Plaintiff Brothers' individual experience as a WAXS shareholder. It appears on the face of Plaintiff Brothers' three plaintiff certification forms that he sold all his shares in WAXS on December 1 and 2 of 1998—just days after the merger took place. See Paragraph 8, Brothers' Plaintiff Certification Forms. If so, Plaintiff Brothers may not be able to prove that he suffered any harm as a result of the merger and Defendants' alleged misstatements. In fact, it appears that Plaintiff Brothers may have profited from the misstatements and resultant inflated price of WAXS stock. Thus, it does not appear that Brothers could properly represent those members of the Telco class who were harmed by the merger.

2. § 20(a) claims

As noted above, § 20(a) of the Exchange Act is dependent upon a finding that an underlying violation of the Securities

Act exists. Plaintiff Brothers has alleged that Defendants were controlling persons of WAXS. Plaintiff Brothers, however, has not satisfied all elements of the § 10(b) and Rule 10b-5 claims, as detailed above. The underlying violation element of § 20(a) has therefore not been satisfied.

3. § 11 claims

As previously noted, § 11 of the Securities Act of 1933 makes it unlawful for a seller of securities to include material misstatements of fact or omissions of fact in a registration statement or prospectus. 15 U.S.C. § 77k. Plaintiff Brothers claims that the Telco Merger Registration statement and prospectus contained material misstatements and omissions of fact regarding WAXS performance and the failure of the CDX switch. Plaintiff Brothers therefore wishes to represent all Telco shareholders who exchanged their Telco shares for WAXS stock in the November 30, 1998 merger.

Section 11 merely requires that all plaintiffs show that the registration statement or prospectus contained a material misstatement of fact or an omission of material fact and that they lost money on the securities purchased under the misleading document. Plaintiff Brothers, however, cannot satisfy these requirements as it appears he sold all his WAXS stock just days after the Telco merger and gained rather than lost money. Plaintiff Brothers has therefore failed to show that he can adequately represent the Telco class on the § 11 claim as he does not meet one of the fundamental elements of the claim—loss of money.

4. § 15 claims

The court denies Plaintiff Brothers' motion to certify the Telco merger class. As previously discussed, it appears that Plaintiff Brothers sold all of his WAXS stock within three days of the effective date of the merger. As a result, Plaintiff Brothers cannot possibly satisfy the loss causation element of

§ 10(b) and Rule 10b-5, nor can he satisfy the loss element of § 11 of the Securities Act.

Analysis:

It would be entirely unfair to tie the fortunes of all potential Telco class members to that of a lead plaintiff who cannot satisfy the basic elements of the claims presented. Due to his sale of stock, Plaintiff Brothers has failed to meet his burden of showing that his claim is typical of those of the other class members. For this reason, the court denies Plaintiff Brothers' class certification motion.

The court would usually deny this motion without prejudice, should Plaintiff Brothers be able to show that the Plaintiff Certification form listed his transactions in WAXS stock incorrectly. The court, however, is not inclined to do so in this case as Plaintiff Brothers has had at least two opportunities to file this motion with accurate and adequate evidence to support his argument. The court therefore denies Plaintiff Brothers' class certification motion with prejudice.

The court therefore DENIES Plaintiffs' motions for class certification [63-1] with prejudice.

SO ORDERED, this 1 day of July, 2002.

/s/ Orinda D. Evans
ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

[Filed Jul. 26, 2001]

CIVIL ACTION NO. 1:99-CV-43-ODE

IN RE: WORLD ACCESS, INC.
SECURITIES LITIGATION

ORDER

The instant federal securities litigation is presently before the court on the parties' joint stipulation and proposed order for certification of a class. The parties seek to certify a class of the following individuals:

> all persons (other than Defendants herein and the members of their immediate families, their heirs, successors, assigns, or affiliates, and any other officers and directors of World Access, Inc. or its affiliates), who: (i) acquired securities of WAXS in the NACT Merger; (ii) acquired securities of WAXS in the TELCO Merger; or (iii) purchased securities of WAXS in the open market during the period April 29, 1997, through February 11, 1999, and who were damaged thereby (the "Class").

(Proposed Order, p. 2).

In the proposed order for certification, the parties summarily assert that the proposed class "[s]atisfies the requirements of Rules 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure." (Proposed Order, p. 2). However, the parties have failed to make an appropriate showing that the requirements of Rule 23 have been satisfied as required by

the United States Supreme Court. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997). Accordingly, because the parties have failed to make such a showing in the present case, the parties' proposed joint stipulation [#__] is REJECTED.

SO ORDERED, this 25th day of July, 2001.

/s/ Orinda D. Evans
ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

APPENDIX F

FEDERAL RULES OF CIVIL PROCEDURE

Rule 23. Class Actions

(a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the

fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) *Determining by Order Whether to Certify a Class Action; Appointing Class Counsel; Notice and Membership in Class; Judgment; Multiple Classes and Subclasses.*

(1)(A) When a person sues or is sued as a representative of a class, the court must—at an early practicable time—determine by order whether to certify the action as a class action.

(B) An order certifying a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) An order under Rule 23(c)(1) may be altered or amended before final judgment.

(2)(A) For any class certified under Rule 23(b)(1) or (2), the court may direct appropriate notice to the class.

(B) For any class certified under Rule 23(b)(3), the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly state in plain, easily understood language:

- the nature of the action,
- the definition of the class certified,
- the class claims, issues, or defenses,

- that a class member may enter an appearance through counsel if the member so desires,
- that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and
- the binding effect of a class judgment on class members under Rule 23(c)(3).

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) *Orders in Conduct of Actions.* In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on

the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) *Settlement, Voluntary Dismissal, or Compromise.*

(1)(A) The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class.

(B) The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.

(C) The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

(2) The parties seeking approval of a settlement, voluntary dismissal, or compromise under Rule 23(e)(1) must file a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise.

(3) In an action previously certified as a class action under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(4)(A) Any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires court approval under Rule 23(e)(1)(A).

(B) An objection made under Rule 23(e)(4)(A) may be withdrawn only with the court's approval.

(f) *Appeals.* A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) *Class Counsel.*

(1) *Appointing Class Counsel.*

(A) Unless a statute provides otherwise, a court that certifies a class must appoint class counsel.

(B) An attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class.

(C) In appointing class counsel, the court

(i) must consider:

- the work counsel has done in identifying or investigating potential claims in the action,
- counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action,
- counsel's knowledge of the applicable law, and
- the resources counsel will commit to representing the class;

(ii) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(iii) may direct potential class counsel to provide information on any subject pertinent to the

appointment and to propose terms for attorney fees and nontaxable costs; and

(iv) may make further orders in connection with the appointment.

(2) *Appointment Procedure.*

(A) The court may designate interim counsel to act on behalf of the putative class before determining whether to certify the action as a class action.

(B) When there is one applicant for appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1)(B) and (C). If more than one adequate applicant seeks appointment as class counsel, the court must appoint the applicant best able to represent the interests of the class.

(C) The order appointing class counsel may include provisions about the award of attorney fees or nontaxable costs under Rule 23(h).

(h) *Attorney Fees Award.* In an action certified as a class action, the court may award reasonable attorney fees and nontaxable costs authorized by law or by agreement of the parties as follows:

(1) *Motion for Award of Attorney Fees.* A claim for an award of attorney fees and nontaxable costs must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision, at a time set by the court. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) *Objections to Motion.* A class member, or a party from whom payment is sought, may object to the motion.

(3) *Hearing and Findings.* The court may hold a hearing and must find the facts and state its conclusions of law on the motion under Rule 52(a).

(4) *Reference to Special Master or Magistrate Judge.* The court may refer issues related to the amount of the award to a special master or to a magistrate judge as provided in Rule 54(d)(2)(D).

CREDITS

(As amended Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 24, 1998, eff. Dec. 1, 1998; Mar. 27, 2003, eff. Dec. 1, 2003.)

(2)

No. 04-1157

Supreme Court, U.S.
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In The Supreme Court of the United States

STEVEN A. ODOM, MARK GERGEL, HENSLEY E. WEST, MARTIN D. KIDDER, STEPHEN J. CLEARMAN,

Petitioners,

v.

PEDRO YANG, CAROL JACKSON, PETER S. KELSCH, ON BEHALF OF THEMSELVES AND ALL PERSONS SIMILARLY SITUATED; JAMES BARBERIAN, JOSEPH KINOSIAN, KAREN KINOSIAN, JASON THOMPSON, RAYMOND T. CRUMP,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does *American Pipe* tolling properly apply to permit a second class action that asserts claims that had been denied class certification in a prior action solely because of the individual deficiencies of different class representatives?

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INTRODUCTION

In the decision below, the Third Circuit held that class claims of certain subclasses were tolled under the rule adopted by this Court in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983). According to the court below, these class claims could be timely asserted by class representatives where an earlier class action, which had been brought by other class representatives and asserted the same claims, had been denied class certification solely because of Rule 23 deficiencies of the individual class representatives. On the other hand, the court below also held that other class claims asserted on behalf of another subclass in the earlier class action could not be tolled where class certification had been denied by the prior court because the claims were not appropriate for class action treatment. The distinction made by the court below is important because when denial of class certification is based on the deficiency of a particular class representative, no ruling of any kind has been made as to claims of absent class members. However, when denial of class certification is based on a class-wide defect, such as a lack of numerosity or commonality, a ruling has been made that the class claims are not appropriate for class action treatment, regardless of who the proposed representative is.

In seeking *certiorari*, Petitioners (Defendants below) attempt to blur this critical distinction by stating, incorrectly, that the Third Circuit's ruling would allow any putative class member to "relitigate *the propriety* of class certification" (Pet. 2; emphasis added) and by incorrectly contending that the Third Circuit is in conflict with many other circuits. However, in each of the other circuit court cases that Petitioners cite, class certification was denied

because of a defect in the class itself, not because of any deficiency of the class representative. *See Basch v. Ground Round, Inc.*, 139 F.3d 6 (1st Cir. 1998) (class treatment inappropriate because individual issues predominate); *Andrews v. Orr*, 851 F.2d 146 (6th Cir. 1988) (class inappropriate because no common issues); *Robbin v. Fluor Corp.*, 835 F.2d 213 (9th Cir. 1987) (commonality not met); *Korwek v. Hunt*, 827 F.2d 874 (2d Cir. 1987) (class inappropriate because of unmanageability); *Salazar-Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334 (5th Cir. 1985) (common issues did not predominate). The Third Circuit's decision does not conflict with any of these decisions.

More recently, in *McKowan Lowe & Co. v. Jasmine, Ltd.*, 295 F.3d 380 (3d Cir.), *cert. denied sub nom. Arthur Andersen, LLP v. Berger*, 537 U.S. 1088 (2002), the Third Circuit held that *American Pipe* tolling allowed an absent class member to intervene and continue to enforce class claims where class certification had been denied solely because of a deficiency of the previous class representative. This Court denied defendants' petition for *certiorari*. The argument that there is a supposed split in the circuits is no more compelling now than when the Third Circuit decided the *McKowan* case.

The sole authority on which Petitioners rely that appears to be in conflict with the other circuit courts is the Eleventh Circuit's decision in *Griffin v. Singletary*, 17 F.3d 356 (11th Cir. 1994). However, the continued viability of that decision is doubtful at best. As discussed below, the *Griffin* decision had unusual facts, did not offer any reasoned analysis, and relied entirely on decisions of courts of appeals for the Second, Fifth, Sixth, and Ninth Circuits, which are all consistent with the Third Circuit's

decision. Indeed, the Ninth Circuit's later decision in *Catholic Social Services, Inc. v. Immigration & Naturalization Serv.*, 232 F.3d 1139 (9th Cir. 2000) (en banc), demonstrates that the Ninth Circuit's position is consistent with that of the Third Circuit. If the Eleventh Circuit decided the issue today, it is far from certain that it would refuse to adopt the Third Circuit's approach. Thus, there is no clear split of authority among the circuits that would require this Court's intervention.

STATEMENT OF THE CASE

This action was brought in the District of New Jersey on December 17, 2002, by Pedro Yang, Carol Jackson, and Peter S. Kelsch against certain former officers and directors of World Access, Inc. ("WAXS") as a class action alleging claims under Sections 10(b) and 20(a) of the 1934 Act and SEC Rule 10b-5 promulgated thereunder, and Sections 11 and 15 of the 1933 Act. The complaint alleges three separate subclasses on behalf of (i) those who purchased securities of WAXS in the open market during the period April 29, 1997, through February 11, 1999 (the "Class Period"; the "Open-Market subclass"); (ii) those who acquired securities of WAXS in the merger of Telco Systems Inc. ("Telco") into WAXS (the "Telco subclass"); or (iii) those who acquired securities of WAXS in the merger of NACT Telecommunications Inc. ("NACT") into WAXS (the "NACT subclass").

Plaintiffs allege that Defendants issued materially false and misleading statements and omitted to disclose material information concerning the products, revenues, earnings, inventory, and sales practices of WAXS.

The Course of Proceedings

On January 7, 1999, shortly after Defendants' and WAXS's first partial disclosure of their fraud was revealed, the first of twenty-two class action complaints was filed in the Northern District of Georgia. After consolidation of the actions, filing of a Consolidated Amended Complaint (the "Georgia Complaint"), and denial of Defendants' motion to dismiss, Defendants agreed to stipulate to class certification. However, the district court rejected the stipulation and ordered Plaintiffs to renew their motion for class certification.

The district court denied the renewed class certification motion with prejudice, even though Defendants had not opposed the motion. Plaintiffs' motion for reconsideration, as well as Plaintiffs' petition for interlocutory appeal under Fed. R. Civ. P. 23(f), were denied. Following the denial of class certification, the Georgia Action continued on behalf of five individual plaintiffs, each of whom had significant losses. Ultimately, only two individual plaintiffs decided to maintain individual actions. After the Georgia Court granted summary judgment against the two individual plaintiffs and in favor of Defendants and while the appeal of that order was pending, both individual plaintiffs settled with the Defendants.

On December 17, 2002, plaintiffs Pedro Yang, Carol Jackson, and Peter S. Kelsch (who were not named plaintiffs in the Georgia Action) filed the present action in the District of New Jersey. By order dated, March 18, 2003, the New Jersey district court consolidated this action with a subsequently filed and substantially identical action and appointed Jason Thompson and Raymond T. Crump as lead plaintiffs. Neither Mr. Thompson nor Mr. Crump had

been a named plaintiff or proposed class representative in the Georgia Action.

On or about March 13, 2003, Defendants moved to dismiss the Complaint arguing, among other things, that the action was barred because the statute of limitations had expired. By Decision and Order dated June 2, 2003, the district court granted Defendants' motion to dismiss.

The Decision of the Third Circuit

The Third Circuit reversed in part and affirmed in part. Specifically, the court of appeals held that:

> *American Pipe* tolling allows litigants whose individual lawsuits would have been timely with the benefit of tolling due to an earlier class action to aggregate their claims in a substantively identical class suit so long as the denial of certification in the earlier action was based solely on Rule 23 deficiencies of the putative representative.

The court also held, however, that "*American Pipe* tolling does not apply to later class actions where a substantially identical class suit was denied certification due to a Rule 23 defect in the class itself."

Significantly, although the court of appeals described "three approaches" that the courts of appeals have used related to the tolling issue, it found that none of the other decisions of the other courts of appeals (all of which Petitioners cite in the Petition), with the exception of the Eleventh Circuit's decision in *Griffin*, conflicts with either its prior decision in *McKowan* or its ultimate holding here. Thus, in every one of those cases where *American Pipe* tolling was found not to apply, class certification had been

previously denied due to a Rule 23 defect in the class itself.

Applying its holding to the facts, the Third Circuit determined that the Georgia district court had previously denied class certification as to two of the three subclasses (Telco and Open-Market) based on the inadequacy of the proposed class representatives – not because those subclasses were inappropriate for class treatment.[1] As to the third subclass (NACT), the Court determined that the Georgia District Court had denied class certification based upon a lack of numerosity. Thus, that particular subclass was not appropriate for class treatment.

Judge Alito concurred with the holding of the court's decision as to the Telco and NACT subclasses, but disagreed as to the Open-Market subclass solely because he believed, on the facts of the case, that the Open-Market subclass had failed class certification in the prior action because it was not appropriate for class-wide treatment and not because of any deficiency of the class representative.

REASONS FOR DENYING THE PETITION

A. There Is No Genuine Conflict in the Circuits Over the Application of the Tolling Rule

Petitioners' primary argument for granting the Writ is that the circuits are deeply split over the tolling issue.

[1] The two proposed class representatives in the Georgia Action that were found to be inadequate were William B. Tanner, on behalf of the Open-Market subclass, and John Brothers, on behalf of the Telco subclass. Neither Mr. Tanner nor Mr. Brothers is a named plaintiff or proposed class representative in the New Jersey Action.

However, close examination of the cases Petitioners cite reveals that, with the possible exception of *Griffin v. Singletary*, 17 F.3d 356 (11th Cir. 1994) (discussed below), none is inconsistent with the Third Circuit's holding in this case.

In each of the cases Petitioners cite, except *Griffin*, the circuit courts affirmed a district court's holding that the action was not appropriately treated as a class action. These holdings are consistent with that part of the Third Circuit's decision here affirming dismissal of the NACT sub-class because the district court had found that a lack of numerosity meant that those claims were inappropriate for class treatment. The holdings of the cases Petitioners cite are also not inconsistent with that part of the Third Circuit's decision that found that tolling was appropriate for the Telco and Open-Market classes because the Georgia district court had not suggested that those claims were inappropriate for class treatment, but had merely determined that the two proposed class representatives in Georgia were deficient.

Thus, in *Salazar-Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334 (5th Cir. 1985), the Fifth Circuit affirmed the district court's order denying certification because the court agreed that common issues did not predominate and class status would not be superior to individual claims. The Fifth Circuit held that once the first class certification petition was denied *because of a defect in the underlying class* there could be no piggybacking "for any subsequent petitions involving the same class." 765 F.2d at 1351. In *Korwek v. Hunt*, 827 F.2d 874 (2d Cir. 1987), the Second Circuit affirmed the district court's holding of a "definitive determination of inappropriateness of class certification" because the alleged class of futures

contracts purchasers was unmanageable, and a second attempt at class status that simply repeated the same claims could not cure the problem of unmanageability. 827 F.2d at 879. In *Robbin v. Fluor Corp.*, 835 F.2d 213 (9th Cir. 1987), while the Ninth Circuit rejected without discussion a subsequent class action, *id.* at 215, the record shows that class certification had been denied in the original lawsuit because the district court determined that the commonality requirement was not met, thus making class action treatment inappropriate. *See Schlesinger Inv. P'ship v. Fluor Corp.*, No. 81 Civ. 2852, 1983 U.S. Dist. LEXIS 15329, at *13-14 (S.D.N.Y. July 14, 1983).

Also, in *Andrews v. Orr*, 851 F.2d 146 (6th Cir. 1988), the district court had denied class certification in a Title VII case because, among other things, plaintiffs had not "established a question sufficiently common to all proposed class members to meet the requirements of Fed.R.Civ.P. 23(a)(2)." *See Brown v. Orr*, 99 F.R.D. 524, 527 (S.D. Ohio 1983). The Sixth Circuit affirmed the district court's dismissal of the class claims because the named plaintiffs had failed to exhaust administrative remedies within the required time period, and equitable tolling could not be applied to extend the time in which individual plaintiffs could file administrative complaints. The Sixth Circuit, without specifically referring to the grounds for denial of class certification by the district court (*i.e.*, a defect in the class), further held there could be no tolling for class claims, simply citing *Korwek*, *Salazar* and *Robbin*, and quoting those courts' warnings against abuse by piggybacking and repetitive filings. 851 F.2d at 149. Finally, in *Basch v. Ground Round, Inc.*, 139 F.3d 6 (1st Cir. 1998), the First Circuit affirmed the district court's holding that after four different tries by various proposed

class representatives, the underlying class as a whole was deficient because individual issues predominated over the common issues. 139 F.3d at 7 and 8 n.4.

As the court below correctly recognized, *Catholic Social Services, Inc. v. Immigration & Naturalization Serv.*, 232 F.3d 1139 (9th Cir. 2000) (en banc), also supports the Third Circuit's decision below. In *Catholic Social Services*, the district court first properly certified a class, but after a change in the law deprived the named plaintiffs of a jurisdictional basis for their claims, a second class action by different class representatives was filed and also was certified. The majority held that the filing of the first class action tolled the limitations period for the later-filed class action because the second class action *did not seek to relitigate the deficiency that caused the earlier denial of class certification,* thereby distinguishing the case before it from the court's earlier decision in *Robbin*. Thus, *Robbin* and *Catholic Social Services* taken together support the distinction made by the Third Circuit as to the application of the tolling doctrine.

In *McKowan Lowe & Co. v. Jasmine, Ltd.*, 295 F.3d 380 (3d Cir.), *cert. denied sub nom. Arthur Andersen, LLP v. Berger*, 537 U.S. 1088 (2002), the Third Circuit held that *American Pipe* tolling allowed an absent class member to intervene and continue to enforce class claims where class certification had been denied solely because of a deficiency of the previous class representative. This Court denied defendants' petition for *certiorari*. The argument that there is a split in the circuits is no more compelling now than when the Third Circuit decided *McKowan*. Petitioners rely heavily on *Griffin* to create a split in the circuits. However, *Griffin*, which was decided eleven years ago, is atypical in that a class was initially certified, but later, a

change in the law deprived the named plaintiffs of standing. In affirming the decertification of the class, the Eleventh Circuit described the more than fifteen-year history of the case, where more than sixty different named plaintiffs repeatedly attempted to assert a wide variety of uncohesive individual and class claims. *See* 17 F.3d at 357-59. Without analysis, *Griffin* cited *Andrews*, *Korwek*, *Salazar*, and *Robbin* and held that "Plaintiffs may not piggyback one class action onto another and thus toll the statute of limitations indefinitely." As shown above, all of the decisions relied upon in *Griffin* are actually consistent with the Third Circuit's decision. Moreover, as the Third Circuit concluded, the Ninth Circuit's subsequent decision in *Catholic Social Services* removes any doubt that the Ninth Circuit's position is consistent with that of the Third Circuit. Based on the unusual circumstances in *Griffin* and its lack of analysis and consideration of the distinction made by the Third Circuit, it is hardly a foregone conclusion that the Eleventh Circuit would adhere to its decision in *Griffin*, to the extent that it would preclude the application of tolling in circumstances where class certification had been denied in an earlier action based solely on the deficiencies of other putative representatives.[2]

[2] After class certification was denied in the Georgia Action, Plaintiffs here chose to file a new case in the District of New Jersey, where there are both jurisdiction and venue, and where *McKowan* controls, rather than taking on the added burden of challenging the continuing validity of *Griffin* in the Eleventh Circuit.

B. The Third Circuit's Decision Is Correct and Consistent with this Court's Rationale for Adopting the Tolling Rule

In adopting the tolling rule in *American Pipe* and *Crown, Cork & Seal*, this Court held that tolling is required to eliminate any necessity or incentive for absent class members to pursue their individual claims by intervening or filing their own complaint prior to a determination of whether the case should proceed as a class action.

In *American Pipe*, the district court had denied class certification because of a lack of numerosity. 414 U.S. at 543. After the entry of that order, the district court denied the motions of various entities that were within the class definition to intervene as individual plaintiffs. *Id.* at 543-44. The Ninth Circuit reversed. *See id.* at 545. Affirming the judgment of the Ninth Circuit, the Court adopted a rule tolling the statute of limitations for these entities because it was "convinced that the rule most consistent with federal class action procedure must be that the commencement of a class action suspends the applicable statute of limitations *as to all asserted members of the class* who would have been parties had the suit been permitted to continue as a class action." 414 U.S. at 553-54 (emphasis supplied). "A contrary rule allowing participation only by those potential members of the class who had earlier filed motions to intervene in the suit would deprive Rule 23 class actions of the efficiency and economy of litigation which is the principal purpose of the procedure." *Id.* at 553.

In *Crown, Cork & Seal*, the district court denied class certification for, among other reasons, a lack of numerosity. 462 U.S. at 348. Rather than intervene, as in *American Pipe*, a plaintiff who was within the class definition filed a

separate, individual action. The district court granted summary judgment against the plaintiff based on the expiration of the statute of limitations and the Fourth Circuit reversed, based on *American Pipe* tolling. Affirming the Fourth Circuit decision, the Court had the opportunity to limit the scope of the tolling rule in *Crown, Cork & Seal Co.*, 462 U.S. at 350-51, but, instead, concluded that "[w]hile *American Pipe* concerned only intervenors," the rule "is not to be read so narrowly" that it would result in the needless multiplicity of actions that the Court created the tolling rule to avoid. The Court concluded that the tolling rule must be read to eliminate "every incentive to file a separate action prior to the expiration of [each absent class member's] own period of limitation." *Id.* at 349.

The severe limitation on the tolling rule that Petitioners propose – that denial of class certification *for any reason* will prohibit class tolling – would create a strong incentive for class members to file separate duplicative class actions or to intervene as class representatives in the pending action *prior* to the class certification decision in order to protect their ability to pursue their claims on a class basis. Petitioners' argument should be rejected as inimical to the Court's basis for creating the tolling rule.

Petitioners' proposed limitation is also seriously flawed because it ignores the realities of the well-recognized necessity for class actions. This Court has consistently held that Rule 23 has an important remedial purpose and is necessary to enable claims too small to be pursued separately to be joined together. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 616 (1997) ("[The drafters of Rule 23] had dominantly in mind vindication of 'the rights of groups of people who individually would be without

effective strength to bring their opponents into court at all.'" (citation omitted)); *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980) ("Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device."). As the Third Circuit emphasized in *McKowan*, "[c]lass actions are a particularly appropriate and desirable means to resolve claims based on the securities laws, 'since the effectiveness of the securities laws may depend in large measure on the application of the class action device.'" 295 F.3d at 384 (quoting *Eisenberg v. Gagnon*, 766 F.2d 770, 785 (3d Cir. 1985) (citations omitted)). Under Petitioners' proposed rule, denial of class certification because of the deficiency of one proposed class representative would be the equivalent of dismissal (but with no decision as to whether the case is appropriate for class treatment and no hearing on the merits of the case) as to most class members for whom litigating on an individual basis would not be economically feasible.

C. Petitioners' Arguments that the Issues Presented Are Recurring and Important to the Fair Administration of Justice Are Incorrect

Petitioners argue that "[t]he recurring nature of the question presented is vividly illustrated by the numerous opinions of courts of appeals and district courts that have grappled with the issue." (Pet. 19.) Instead of citing to those supposedly "numerous" cases, Petitioners merely state that there are thousands of class actions pending and more than 3000 new class actions filed each year. Rather than supporting Petitioners' argument, these

numbers are a testament to how rarely the tolling issues presented here are actually litigated. Significantly, the age of the handful of circuit court cases that Petitioners rely upon – going back to 1985 – also indicates that the issue is not often litigated.

In this same vein, Petitioners argue that the Third Circuit's holding would allow "successive, replicative, 'stacking'" of class claims. (Pet. 20.) However, the holding here is exactly the opposite. The Third Circuit, here, affirmed dismissal of the NACT subclass precisely because it would not allow the relitigation in New Jersey of the Georgia Court's finding that the NACT subclass lacked numerosity. On the other hand, the Third Circuit recognized that the holdings by the Georgia Court concerning the Open-Market and Telco subclasses only implicated deficiencies of the two particular proposed class representatives in that case (William B. Tanner and John Brothers); that the Georgia Court had not determined whether the Open-Market and Telco claims were or were not appropriate for class treatment; and that Plaintiffs in the New Jersey Action were not seeking to relitigate the appropriateness of Tanner and Brothers to be class representatives. Neither of these two people is, in fact, a named plaintiff, lead plaintiff, or proposed class representative in the New Jersey Action.

Similarly, Petitioners' concern that the Third Circuit's holding is "administratively unworkable" is incorrect. The Third Circuit's rule is simply that a district court should look within the four corners of the prior class certification denial to see whether the denial is based *solely* on the inappropriateness of the proposed class representative or

whether the claim is determined to be inappropriate for class treatment.[3] While Petitioners are certainly correct that in some cases there may be no "bright line between the test for an adequate representative and the test for the propriety of class certification" (Pet. 22-23), even in Petitioners' example of *Amchem*, it was, according to Petitioners, "clear that common issues did not predominate." (*Id.*) Thus, under the Third Circuit's ruling here, tolling would not apply in that situation where there was a class-wide deficiency.

Petitioners provide one, and only one, choice "to cure the inadequacy of a class representative in those case where the inadequacy is based on the individual representative's deficiencies rather than deficiencies within the class as a whole." (Pet. 22.) While Petitioners' suggestion of a court's permitting intervention of a new proposed class representative is certainly one possible choice, it is not the only choice. In *Crown, Cork & Seal*, where the class had been decertified based, in part, on a lack of numerosity, this Court made it clear that limiting a class member's choice to intervention would cause many of the same inefficiencies recognized in *American Pipe* (462 U.S. at 350), that a class member might prefer to bring an individual suit rather than intervene (*id.*), and that intervention might be denied by the district court for reasons unrelated to the merits of the claim (*id.*). Petitioners' cry of "forum shopping" was also considered and rejected in

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[3] While Judge Alito may have disagreed with the method of making this determination as applied to the facts of this case, he did not disagree with the basic holding that tolling should apply where denial of class certification was based solely on the inappropriateness of the proposed class representative.

Crown, Cork & Seal where the Court explained that a class member might have legitimate reasons to prefer to bring a new suit in a different forum. *Id.* Moreover, while plaintiffs do routinely commence suits in forums that they think will be advantageous, defendants just as routinely remove or seek to transfer those cases to forums that they think will be advantageous. In addition, while Petitioners may wish to have a single court make the Rule 23 inquiry (Pet. 22), the *Crown, Cork & Seal* Court rejected this same argument, ruling that "[o]ther avenues exist by which the burdens of multiple lawsuits may be avoided." *Id.* at 353.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

April 22, 2004

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IN THE

Supreme Court of the United States

STEVEN A. ODOM; MARK GERGEL; HENSLEY E. WEST; MARTIN D. KIDDER; STEPHEN J. CLEARMAN,

Petitioners,

v.

PEDRO YANG; CAROL JACKSON; PETER S. KELSCH, on behalf of themselves and all persons similarly situated; JAMES BARBERIAN; JOSEPH KINOSIAN; KAREN KINOSIAN; JASON THOMPSON; RAYMOND T. CRUMP,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY IN SUPPORT OF PETITION FOR CERTIORARI

I. THIS COURT SHOULD RESOLVE THE CIRCUIT CONFLICT ON THE SCOPE OF *AMERICAN PIPE* TOLLING.

Plaintiffs *say* that there is no conflict among the circuits on the question whether the statute of limitations should be tolled for "would-be class members who file a class action following the denial of class certification due to Rule 23 deficiencies of the class representative," App. 12a, but their actions speak louder and more candidly than their words. As plaintiffs acknowledge,

> [a]fter class certification was denied in the Georgia Action, Plaintiffs here chose to file a new case in the District of New Jersey, . . . where *McKowan [Lowe & Co.* v. *Jasmine, Ltd.*, 295 F.3d 380 (3d Cir. 2002)] controls, rather than taking on the added burden of challenging the continuing validity of *Griffin* [v. *Singletary*, 17 F.3d 356 (11th Cir. 1994)] in the Eleventh Circuit." [Opp. 10 n.2.]

Plaintiffs and plaintiffs' class-action attorneys plainly recognize that the legal rules in the Third and Eleventh Circuits conflict. Equally important, the Third Circuit recognizes that the circuits are in conflict, stating that whatever it decided, its decision would "inevitably break from some Circuits' treatment of the issue." App. 12a.

Plaintiffs are correct that the circuits unanimously agree that, as a general rule, *American Pipe* does not allow a plaintiff to file a second class action following a definitive determination that class certification under Federal Rule of Civil Procedure 23 is inappropriate. See *American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538 (1974). But, the circuits clearly are in conflict about whether there is an exception to the general rule if class certification is denied based on the

inadequacy of the class representative. In the decision below, the Third Circuit held that *American Pipe* tolls the statute of limitations for a second or third or even fourth class action if class certification is denied based on the deficiencies of the class representative. In *Griffin* v. *Singletary*, the Eleventh Circuit rejected precisely that argument, refusing to toll the statute of limitations in a second class action when the first class action was denied due to the inadequacy of the class representative. 17 F.3d 356, 359 (11th Cir. 1994).

In addition, the First, Second, Fifth, Sixth and Ninth Circuits have held that *American Pipe* forbids "piggyback[ing] one class action onto another" for tolling purposes, *Salazar-Calderon* v. *Presidio Valley Farmers Ass'n*, 765 F.2d 1334, 1351 (5th Cir. 1985), with no suggestion that this rule comes with a caveat that it does not apply if certification was denied based on the class representative's inadequacy. See Pet. 10-15. And, numerous district courts have concluded that the prohibition on piggybacking applies to class actions denied based on the class representative's inadequacy. *Id.* at 14 n.2. Finally, like the Third Circuit itself, the principal treatises and other commenters have concluded that the courts of appeals are in conflict. See, *e.g.*, 5 James W. Moore, *Moore's Federal Practice* § 23.65[1][b] (3d ed. 2004), and other authorities cited at Pet. 15-16.

Indeed, plaintiffs do not dispute that the legal rules announced by the courts of appeals are in conflict. Instead, plaintiffs say: (i) most of the cases can be distinguished from this case on their facts, (ii) *Catholic Social Services, Inc.* v. *INS*, 232 F.3d 1139 (9th Cir. 2000) (en banc), supports the decision below, and (iii) *Griffin* might be overturned by the Eleventh Circuit on reconsideration.

Initially, plaintiffs' hope that the courts of appeals will eventually adopt exceptions to the announced definitive legal rule barring piggybacking is misguided. In each case, the court of appeals explains its decision to preclude

piggybacking in terms that make clear no such exception would be permitted.

In *Salazar-Calderon*, the court of appeals relied on Justice Powell's concern that the *American Pipe* tolling rule "is a generous one, inviting abuse," see *Crown, Cork & Seal Co.* v. *Parker*, 462 U.S. 345, 354 (1983) (Powell, J., concurring), in forbidding piggybacking that might "toll the statute of limitations indefinitely." *Salazar-Calderon*, 765 F.2d at 1351. Similarly, in *Korwek* v. *Hunt*, 827 F.2d 874 (2d Cir. 1987), the court refused to toll the statute of limitations for a new class action, because the proposed extension of *American Pipe* "would be inimical to the purposes behind statutes of limitations and the class action procedure." *Id.* at 879. The Ninth Circuit, too, feared that extending *American Pipe* would be "'abusive.'" *Robbin* v. *Fluor Corp.*, 835 F.2d 213, 214 (9th Cir. 1987). And, the First Circuit refused to adopt an approach that would allow plaintiffs to "stack one class action on top of another and continue to toll the statute of limitations indefinitely." *Basch* v. *Ground Round, Inc.*, 139 F.3d 6, 11 (1st Cir. 1998).

In each of these cases, the court's analysis makes clear that, if class certification were denied based on the inadequacy of the representative, the court would *not* expand the already generous tolling rule of *American Pipe* and permit indefinite tolling and the accompanying distortion of the purposes of having a limitations period. Instead, these courts would embrace the obvious option of requiring another class member to intervene in the initial class action and take the place of the inadequate representative. See Pet. 22. This would allow a single court to address the Rule 23 inquiry in a single case, serving the efficiency concerns addressed by *American Pipe* and Rule 23 and preventing both forum shopping and the serious damage to the interest of repose caused by stop-and-start statutes of limitation and the

piggybacking and stacking of cases.[1] *In any event*, nothing in the courts' announcement of a blanket prohibition on piggybacking suggests any qualification.

Second, plaintiffs' assertion that *Catholic Social Services, Inc.* v. *INS*, 232 F.3d 1139 (9th Cir. 2000) (en banc), supports the Third Circuit decision (Opp. 9), if correct, would only deepen the conflict among the circuits that plaintiffs seek to obscure. Plaintiffs, however, are wrong. The Ninth Circuit clearly stated that it would not certify a second class action that was "no more than an attempt to relitigate the correctness of the earlier class certification decision." 232 F.3d at 1147. In *Catholic Social Services*, however, the court found that the legislature had altered the criteria necessary to permit a plaintiff to have standing to bring a claim at issue against the INS, and therefore that the second action was not simply an attempt to circumvent the denial of certification in the first suit. See *id.* at 1149 (the first class was properly certified and then narrowed "for reasons unrelated to Rule 23 certification"). *Catholic Social Services* in no way supports the Third Circuit rule that a plaintiff may file a second class action in a different forum in an attempt to locate a court that will find a class representative adequate.

Finally, plaintiffs' stated belief that *Griffin* may be confined to its particular circumstances (Opp. 10) is belied

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[1] Plaintiffs seem to argue that because this Court denied the petition for certiorari in *McKowan Lowe & Co.* v. *Jasmine, Ltd.*, 295 F.3d 380 (3d Cir.), *cert. denied sub nom. Arthur Andersen, LLP* v. *Berger*, 537 U.S. 1088 (2002), this Court should also deny the petition here. Opp. 9. Even leaving aside that denials of petitions have no precedential value, that contention would clearly be wrong. In *McKowan*, after the court concluded that class certification could not be granted due to an inadequate representative, the court allowed an absent class member to intervene in the same action and seek class certification. Here, the court allowed plaintiffs to engage in forum shopping by permitting them to attempt to obtain class certification from a different court with the attendant problems of inefficiency, delay and the stacking of actions.

not only by their own decision to decamp from the Eleventh Circuit to file their second class action, but also by the language of the holding which plaintiffs fail to quote in full. The court expressly holds that plaintiffs may not "engage in endless rounds of litigation . . . over the adequacy of successive named plaintiffs to serve as class representatives," because that could "toll the statute of limitations indefinitely." 17 F.3d at 359 (quotations omitted). And, as noted, treatises, commenters, and the Third Circuit itself (App. 12a) view the decision below as a "clear split from the Eleventh Circuit's opinion in *Griffin*." Case Note, 116 Harv. L. Rev. 2230, 2233 (2003).

This Court should grant the petition to resolve the conflict among the courts of appeals on this important issue.

II. THE DECISION BELOW CONFLICTS WITH THE PURPOSES OF THIS COURT'S TOLLING RULE.

As explained in the petition, the decision below is incompatible with this Court's reasoning in *American Pipe* and *Crown, Cork & Seal*. Pet. 16-18. These decisions do not contemplate the repeated tolling of statutes of limitations for successive cases involving class claims. Rather, the decisions permit tolling only for "individual actions in the event that class certification is denied." *Crown, Cork & Seal*, 462 U.S. at 346-47. Neither the language nor the rationale of these decisions suggests that the statute of limitations should be tolled a second (and potentially a third and fourth) time for class claims.

Plaintiffs implicitly concede that *American Pipe* and *Crown, Cork & Seal*, by their terms, sanction the tolling only of individual claims. Plaintiffs insist, however, that adhering to this boundary is "inimical to the Court's basis for creating the tolling rule." Opp. 12. Specifically, plaintiffs claim that this Court "concluded that the tolling rule must be read to eliminate 'every incentive to file a separate action prior to the

expiration of [each absent class member's] own period of limitation.'" *Id.* (alteration in original) (quoting *Crown, Cork & Seal*, 462 U.S. at 351). It is plaintiffs who have misunderstood the premises and the dual interests underlying the rules announced in *American Pipe* and *Crown, Cork & Seal*. In those decisions, this Court crafted an equitable rule that "is consistent both with the procedures of Rule 23 *and with the proper function of the limitations statute*." *American Pipe*, 414 U.S. at 555 (emphasis supplied). The tolling rule represents a balance between Rule 23's interest in the "efficiency and economy of litigation," *id.* at 553, and a statute of limitations' goal of repose. Plaintiffs have simply jettisoned the latter purpose, distorting the rationale of *American Pipe* and *Crown, Cork & Seal* to create the appearance that the decision below can be reconciled with this Court's precedent. Moreover, the relitigation of the class certification question in successive cases in different courts does not truly serve Rule 23's efficiency interests.

Guided by their misunderstanding of the premises of *American Pipe* and *Crown, Cork & Seal*, plaintiffs also argue that reversing the Third Circuit "would create a strong incentive for class members to file separate duplicative class actions or to intervene as class representatives in the pending action prior to the class certification decision." Opp. 12 (emphasis omitted). This is clearly wrong.

Initially, the general rule that the limitations period is not tolled for successive class actions does not create a "strong incentive" to file duplicative actions, because if the class representative is deemed inadequate, "courts generally allow class counsel time to make reasonable efforts to recruit and identify a new representative who meets Rule 23(a) requirements." *Manual for Complex Litigation (Fourth)* § 21.26, at 277 (2004). Similarly, under the liberal rule espoused in *McKowan*, for example, tolling would even be permitted where an intervenor sought to replace an inadequate representative after the denial of certification, so long as "the

class has [not] been . . . definitively rejected." 295 F.3d at 382. In short, the problem identified by plaintiffs – that a class representative's inadequacy should not eliminate the class vehicle for all class members – is entirely solved by allowing the intervention of another class member to act as class representative in the same suit, without the inefficiency, forum shopping, stop-and-start limitation periods and stacking of actions that the Third Circuit decision authorizes.

In any event, as an empirical matter, plaintiffs' fears are unfounded. Numerous courts have long refused to toll the statute of limitations for subsequent class claims, and plaintiffs present no support for the notion that the judiciary has been inundated with a flood of protective filings prompted by concerns that a class representative might be inadequate.

For similar reasons, the possibility of intervention assuages any concern that the "denial of class certification because of the deficiency of one proposed class representative would be the equivalent of dismissal" in a case otherwise appropriate for class treatment. Opp. 13. Another class member who intervened in the action would serve as the representative of an otherwise meritorious class. In contrast, the Third Circuit's expansive rule would severely undermine the interest of repose served by statutes of limitations and invite forum shopping by plaintiffs unsatisfied with a court's certification decision. For these reasons, the Third Circuit's broad expansion of the tolling rule is unnecessary to protect "'the rights of groups of people who individually would be without effective strength to bring their opponents into court,'" *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 617 (1997), particularly in light of its substantial detrimental consequences for the administration of statutes of limitations and the efficient adjudication of class claims.

III. THE COURT SHOULD RESOLVE THIS RECURRING QUESTION AND ENSURE THE UNIFORM ADMINISTRATION OF RULE 23.

Plaintiffs dispute the recurring nature of this issue, notwithstanding the thousands of class actions filed in district courts each year, by asserting that there are few reported circuit decisions addressing the issue. The fact that *seven* courts of appeals have been compelled to address this issue demonstrates both its frequent recurrence and its importance in class-action litigation. In addition, numerous district courts have wrestled with this question over the years. See, *e.g.*, Pet. 14 n.2. The question has been percolating for sufficient time to warrant this Court's resolution of the conflict among the circuits and federal district courts.

Curiously, plaintiffs also argue that, far from allowing class plaintiffs to stack successive class actions, the Third Circuit's "holding . . . is exactly the opposite." Opp. 14. But plaintiffs support this argument by focusing on the NACT subclass – the one subclass whose dismissal was *affirmed*. Petitioners agree that this subclass was properly dismissed for lack of numerosity, but the disposition of the NACT subclass has no bearing on this petition, which seeks review of the decision *reversing* the district court's dismissal of the other two subclasses on statute of limitations grounds. Plaintiffs do not seriously dispute that the Third Circuit's decision would permit "putative class members [to] piggyback one class action onto another and thus toll the statute of limitations indefinitely." *Salazar-Calderon*, 765 F.2d at 1351.

Plaintiffs also take issue with petitioners' observation that the Third Circuit's rule is administratively unworkable. Though conceding that "in some cases there may be no 'bright line between the test for an adequate representative and the test for the propriety of class certification,'" Opp. 15 (quoting Pet. 22-23), plaintiffs blithely dismiss this concern by claiming that the opinion in *Amchem* reveals that the Court believed that there was also a defect in the class itself. But

plaintiffs offer no answer to the broader point – that district courts denying class certification "may not always make it clear whether their rulings rest on representative- or class-based defects." App. 30a (Alito, J., dissenting). Indeed, as this case demonstrates, in many instances a court might deny class certification without even identifying the exact defect. See, *e.g.*, *id.* at 81a-82a. And what of cases in which the court simply errs in identifying the provision of Rule 23 that is grounds for denial of class certification? These practical problems will only grow more acute as the Third Circuit becomes a magnet for putative class "actions in which courts in other circuits have denied class certification." *Id.* at 30a (Alito, J., dissenting).

Finally, plaintiffs quarrel with petitioners' observation that there is already a means for curing an inadequate class representative, namely, that class counsel may "recruit and identify a new representative who meets the Rule 23(a) requirements." *Manual for Complex Litigation* § 21.26, at 277; see also *McKowan Lowe*, 295 F.3d at 382 (tolling the statute of limitations for an intervenor who seeks to replace an inadequate class representative "where the class has neither been certified nor definitively rejected"). Plaintiffs acknowledge that "permitting intervention of a new proposed class representative is certainly one possible choice" for protecting an otherwise suitable class, Opp. 15, yet they nonetheless demand a broader rule – despite its substantial detrimental consequences for the administration of Rule 23 and for the sensible enforcement of statutes of limitations. And, plaintiffs' sole authority for this expansive rule – *Crown, Cork & Seal* – is inapposite, because that case only concerned tolling for "individual lawsuits," 462 U.S. at 353, not for a succession of class actions.

The decision below thus represents a significant departure from *American Pipe* and its progeny. The tolling rule, with its well-crafted balance between the efficiency goals of Rule 23 and the interest in repose served by statutes of limitations,

would be upset if class counsel could "engage in endless rounds of litigation . . . over the adequacy of successive named plaintiffs to serve as class representatives." *Griffin*, 17 F.3d at 359. By contrast, replacing an inadequate class representative with another class member through intervention, and allowing the same court to determine whether the inadequacy of the initial class representative can be cured, effectively preserves the efficiency goals of Rule 23. In this way, the problem that the Third Circuit purportedly addressed – preventing plaintiffs from filing "duplicative protective actions in order to preserve their rights," App. 25a – is resolved. There is no good reason to expand the tolling rule to allow plaintiffs to bring entirely new class actions long after a statute of limitations has expired, and there are many good reasons not to do so. The Third Circuit's rule, with its potential severely to undermine the salutary purposes of statutes of limitations, should not be permitted to stand.

This Court should, accordingly, grant review to address and resolve the conflict among the courts of appeals and to establish a uniform tolling rule for class actions that will serve Rule 23 and the interests protected by statutes of limitations, and prevent forum shopping and successive class actions.

CONCLUSION

For the foregoing reasons, and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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